Supreme Court, U.S.
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No. 04-

IN THE

Supreme Court of the United States

CITY OF SEQUIM, WASHINGTON, a municipal corporation, CHIEF BYRON NELSON, and DOES 1-10,

Petitioners,

v.

ANTHONY L. JOHNSON,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

The principal issue in this action for damages under 42 U.S.C. § 1983 is whether Police Chief Byron Nelson is entitled to qualified immunity for arresting Anthony Johnson for violating Washington State's Privacy Act. Johnson contends Chief Nelson did not have probable cause for the arrest. The Ninth Circuit decided Chief Nelson was not entitled to qualified immunity because, in its opinion, Johnson had not violated the Act. Relying on a single, factually distinct decision from the Washington State Supreme Court, a non-precedential opinion of the Washington State Attorney General, and one of its own decisions rendered nearly three years after Johnson's arrest, the Ninth Circuit also concluded Chief Nelson violated a clearly established constitutional right.

Qualified immunity analysis is a two-step process. First, a court must inquire whether a constitutional right would have been violated on the facts alleged. Second, if such a violation is established, a court must inquire whether that right was clearly established. This case presents the following questions for review:

1. When liability under § 1983 is premised on an arrest allegedly made without probable cause, is a constitutional violation conclusively established by proof that the plaintiff did not violate the law the police officer relied upon in making the arrest?

2. May a constitutional right be clearly established by non-decisional and non-precedential legal commentary?

3. Under what circumstances, if at all, may rights recognized in a case of first impression be considered clearly established for purposes of qualified immunity?

PARTIES TO PROCEEDING

The parties to proceedings below were:

Petitioners: The petitioners are the City of Sequim, a municipal corporation; Chief Byron Nelson; and Does 1-10. The petitioners were aligned as defendants in the district court and were respondents at the Ninth Circuit.

Respondent: The respondent is Anthony L. Johnson. The respondent was aligned as the plaintiff in the district court and was the appellant at the Ninth Circuit.

Clallam County, a municipal corporation, and Sheriff W.J. Hawe are not parties to this petition. These parties were aligned as defendants in the district court and were respondents at the Ninth Circuit.

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Appendix B — Order Denying Plaintiff's Motion For Partial Summary Judgment Granting Defendants Motions For Summary Judgment Of The United States District Court For The Western District Of Washington At Tacoma Filed March 12, 2001 ..... 31a

The City of Sequim, Chief Byron Nelson, and Does 1-10 petition this Court for a writ of certiorari for review of the amended opinion of the United States Court of Appeals for the Ninth Circuit entered in this case on October 25, 2004.

OPINIONS BELOW

The Ninth Circuit's majority and dissenting opinions are reported at 388 F.3d 676 (9th Cir. 2004) and are set forth in Appendix A to this petition at pages 1a-30a. The Ninth Circuit reversed an order of the United States District Court for the Western District of Washington at Tacoma; that order is unpublished and is set forth in Appendix B to this petition at pages 31a-42a.

STATEMENT OF JURISDICTION

The Ninth Circuit's original order in this matter was entered on August 31, 2004. On October 25, 2004, upon the granting of a motion for clarification and the denial of a petition for rehearing and for rehearing en banc, the Ninth Circuit entered an amended order. This Court has jurisdiction to review the amended order of the Ninth Circuit under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fourth Amendment to the United States Constitution provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be

> violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

The Washington State statute at issue here is found at RCW 9.73.030(2), which provides in relevant part that

> it shall be unlawful for any individual ... to intercept, or record any ... [p]rivate conversation, by any device electronic or otherwise designed to record or transmit such conversation regardless how the device is powered or actuated without first obtaining the consent of all the persons engaged in the conversation.

STATEMENT OF THE CASE

1. Factual Background

The events giving rise to this matter occurred on January 28, 2000. That day, Anthony Johnson was videotaping friends at a public skateboard park in the City of Sequim, Washington. *App. at 3a.* At the same time, City of Sequim Police Chief Byron Nelson arrived at the park in his patrol vehicle. *Id.* Chief Nelson was on duty and had come to the park to look for a missing juvenile. *App. at 3-4a.* Chief Nelson stopped his vehicle in a parking lot approximately 75 feet away from where Johnson was videotaping. *App. at 4a.*

Johnson began videotaping Chief Nelson as he sat in his patrol vehicle. *Id.* Chief Nelson saw Johnson doing this. After a short time, Johnson approached the patrol vehicle with his video camera. *Id.* As Johnson approached, Chief Nelson's

police radio was operating and he was in the process of dialing his cellular phone to contact police dispatch regarding the juvenile runaway. *Id.*

Johnson was videotaping when he reached the rear of the patrol vehicle. *Id.* Johnson then walked around to the passenger side of the vehicle, at which point Chief Nelson deactivated his cellular phone, rolled down the passenger side window, and asked Johnson what he was doing. *Id.* Although Johnson had stopped recording, he continued to point his video camera at Chief Nelson as if recording. *Id.* Chief Nelson had no way of knowing that Johnson was not recording; Johnson had disabled the video camera's recording indicator light. Johnson knew Chief Nelson could not determine from looking at the camera whether he was being recorded.

Under Washington law, it is a gross misdemeanor to record or intercept a private communication or conversation between two or more individuals without obtaining the consent of the parties involved. RCW 9.73.030; RCW 9.73.080(1). This law is commonly referred to as Washington's "Privacy Act". Chief Nelson warned Johnson twice that Johnson did not have permission to record him and that it was a violation of the law to record conversations without consent. *App. at 4a.* Despite these admonitions, Johnson continued to point his video camera at Chief Nelson.

After the second warning, Chief Nelson got out of his patrol vehicle, again asked Johnson to discontinue his video recording, and again advised him he was violating the law. Johnson became argumentative, all the while continuing to point his video camera at Chief Nelson. At that point, Chief Nelson advised Johnson he wanted to verify whether Johnson

had recorded the chief's conversations with police dispatch. Johnson refused, he and the chief struggled, and Chief Nelson placed Johnson under arrest.

Johnson was transported to the Clallam County Jail. He was charged with recording a communication without permission in violation of the Privacy Act and for resisting arrest. *App. at 5a.* An order determining probable cause was entered on those charges. The prosecutor later amended the criminal complaint to charge Johnson with attempted recording without permission and resisting arrest. *Id.* After extensive review of the law, the Clallam County District Court dismissed the charges on the grounds that the State failed to make a prima facie case.

2. Procedural History

On June 16, 2000, Johnson filed a complaint against Chief Nelson, the City of Sequim, Sequim's mayor, and several "Doe" officers (collectively referred to herein as "the Sequim defendants"). Johnson also named Clallam County and the Clallam County Sheriff ("the Clallam County defendants") for their role in his incarceration at the Clallam County Jail. Johnson filed his action in the United States District Court for the Western District of Washington at Tacoma under 42 U.S.C. § 1983, alleging a variety of constitutional rights violations and state common law claims against all defendants. Johnson invoked the jurisdiction of the district court under 28 U.S.C. §§ 1331, 1343, and 1367. The Sequim defendants filed counterclaims against Johnson for malicious prosecution under Washington State statutory authority.

Both the Sequim and Clallam County defendants moved for summary judgment. The Sequim defendants' motion was made on the grounds that (1) there was no evidence of an unconstitutional policy or custom sufficient to impose liability upon the City for the acts of Chief Nelson; (2) Chief Nelson was entitled to qualified immunity; and (3) Johnson had insufficient evidence to support a prima facie case for each of the state law claims alleged in his complaint. *App. at 37a.* Johnson, in lieu of directly opposing the motions, filed a cross-motion for partial summary judgment.

United States Magistrate Judge J. Kelley Arnold ruled on these motions on March 12, 2001. Judge Arnold denied Johnson's motion for partial summary judgment. Judge Arnold dismissed all claims against the City, finding that Johnson had failed to produce any evidence to support liability on the part of the City under *Monell v. New York Dep't of Social Servs.*, 436 U.S. 658, 98 S. Ct. 2018, 56 L Ed. 2d 611 (1978). *App. at 38a.* Judge Arnold also ruled that Chief Nelson and the other individually named Sequim defendants were entitled to qualified immunity, reasoning that "[t]he nuances of the case law interpreting the Washington Privacy Act are sufficiently fact based, to preclude [Johnson's] claim that he had a 'clearly established right.'" *App. at 39a*. Finally, Judge Arnold dismissed all of Johnson's state law claims against the Sequim defendants, holding that each claim failed as a matter of law. Judge Arnold also dismissed the claims against the Clallam County defendants. *App. at 40-42a.*

Johnson filed his first Notice of Appeal to the Ninth Circuit from Judge Arnold's order on April 12, 2001. That appeal was dismissed for lack of jurisdiction on July 15, 2002, because the case was not ripe for review – the

defendants' counterclaims were not resolved. On January 7, 2003, Judge Arnold dismissed the counterclaims. Johnson filed a second, timely Notice of Appeal to the Ninth Circuit on January 23, 2003.

In a 2-1 decision, the Ninth Circuit reversed the District Court decision, focusing primarily on the issue of Chief Nelson's qualified immunity. The majority determined that Johnson was arrested without probable cause in violation of the Fourth Amendment because his conduct was not criminal under the Privacy Act. *App. at 15a*. To make this determination, the majority resolved a question of first impression: whether a police officer has a reasonable expectation of privacy in communications to police dispatch about an investigation that does not concern a private individual attempting to record those communications.

The majority relied upon three sources of authority and commentary to find that Chief Nelson's arrest violated Johnson's constitutional rights. For case authority, the majority discussed a prior Washington State intermediate appellate court decision, *State v. Flora*, 68 Wn. App. 802, 845 P.2d 1355 (1992), and a Ninth Circuit decision recently reversed by this Court, *Alford v. Haner*, 333 F.3d 972 (9th Cir. 2003), *reversed and remanded by Devenpeck v. Alford*, __ U.S. __, 125 S. Ct. 588 (2004). *App. at 10-12a.* At the time of the majority's decision, both *Flora* and *Alford* stood for the proposition that an arrest is not a private conversation and, therefore, an arrestee's tape recording of his own arrest was not a violation of the Privacy Act. *Flora*, 68 Wn. App. at 808; *Alford*, 333 F.3d at 978. *Alford*, however, was decided more than three years *after* Johnson's arrest.

Second, the majority cited a 1988 Opinion of the Washington Attorney General which considered whether a conversation between 911 dispatch and a member of the public, law enforcement, or fire personnel could be deemed "private" under the Privacy Act. *App. at 13-14a*. In Washington, attorney general opinions are not binding on courts and may be rejected. *Davis v. King Cty.*, 77 Wn.2d 930, 934, 468 P.2d 679 (1970); *see also Nucleonics Alliance Local Union 1-369 v. WPPSS*, 101 Wn.2d 24, 29, 677 P.2d 108 (1984) ("The court is the proper body to determine the construction and interpretation of statutes. Thus, even when the court's interpretation is contrary to that of an agency charged with carrying out the law, it is ultimately for the courts to declare the law and the effect of the statute.").

Third, the majority relied upon its independent analysis. The court reasoned that, by rolling down his window to advise Johnson he believed his conversation was private and that Johnson did not have consent to videotape him, Chief Nelson "knowingly exposed" his private communications to the public.[1] *App. at 12-13a.*

The majority held these authorities were "*sufficiently* established so that Chief Nelson reasonably should have

1. This particular holding appears to be the function of the majority's misapprehension of the circumstances under which Chief Nelson rolled down his window. Chief Nelson did not roll down his window while Johnson was outside his patrol vehicle with the video camera while the Chief was communicating with police dispatch. Chief Nelson rolled down his window in order to advise Johnson that he did not have consent to videotape him and that Chief Nelson believed the attempted videotaping was illegal. Thus, Chief Nelson did not "knowingly expose[]" the communications with dispatch he was attempting to keep private from Johnson.

known that he had no lawful basis to arrest Johnson for violating the Privacy Act." *App. at 16a* (emphasis added). The majority concluded a reasonable police officer would have been aware of the 1988 Attorney General Opinion. The majority also reversed the summary judgment dismissal of the municipal liability claim against the City and Johnson's state law outrage claim.[2] *App. at 19-20a.*

Circuit Judge Gould dissented. Judge Gould believed the majority "extend[ed] Washington law, as expressed in *State v. Flora*, 68 Wn. App. 802, 845 P.2d 1355 (1992), to a setting where it is inapplicable, and otherwise adopt[ed] a view of Washington law that [he does] not think likely would be shared by the Washington State Supreme Court."[3] *App. at 22a.*

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2. The relief sought by the Sequim defendants is a reversal of the Ninth Circuit and a remand of this case to the district court for entry of any necessary orders consistent with the district court's rulings on the summary judgment motions. In this petition, the Sequim defendants do not discuss the Ninth Circuit's rulings on the City's *Monell* liability or Johnson's outrage claim. This is because a finding by this Court that Chief Nelson did not violate a clearly established right of Johnson would obviate any further need to consider those issues. There is no basis for *Monell* liability in the absence of any constitutional injury caused by an individual officer. *See Leatherman v. Tarrant Cty.*, 507 U.S. 163, 166, 113 S. Ct. 1160, 122 L. Ed. 2d 517 (1993) (a municipality cannot be held liable under § 1983 "unless a municipal policy or custom caused the constitutional injury."). Furthermore, the Ninth Circuit only reversed the summary judgment dismissal of the outrage claim because it found that Chief Nelson had violated a clearly established constitutional right. Thus, a reversal of the Ninth Circuit on the qualified immunity issue would not require this Court to consider the *Monell* or outrage claims.

3. Judge Gould's prescience is underscored by a recent decision from the Washington State Supreme Court expansively (Cont'd)

The Ninth Circuit filed its first opinion on August 31, 2004. The Clallam County defendants timely moved for clarification and the Sequim defendants timely petitioned for rehearing with a suggestion for rehearing en banc. On October 25, 2004, the Ninth Circuit granted the motion for clarification, denied the petition for rehearing and rehearing en banc, and ordered that an amended opinion and amended dissent be filed. The amended opinion and dissent were filed that same day.

REASONS FOR GRANTING THE PETITION

> Qualified immunity shields an officer from suit when she makes a decision that, even if constitutionally deficient, reasonably misapprehends the law governing the circumstances she confronted. Because the focus is on whether the officer had fair notice that her conduct was unlawful, reasonableness is judged against the backdrop of the law at the time of the conduct. If the law at that time did not clearly establish that the officer's conduct would violate the Constitution, the officer should not be subject to liability or, indeed, even the burdens of litigation.

Brosseau v. Haugen, __ U.S. __, 125 S. Ct. 596, 599 (2004) (internal citation omitted).

(Cont'd)
holding that the Privacy Act even protects conversations of minor children from interception by their parents within the family residence. *State v. Christenson*, slip op. No. 74839-0, __ Wn.2d __, __ P.3d __ (Dec. 9, 2004).

A proper qualified immunity analysis requires a two-step process. First, a court must inquire whether a constitutional right would have been violated on the facts alleged. Second, if such a violation is established, a court must inquire whether that right was clearly established. *Saucier v. Katz*, 533 U.S. 194, 200, 121 S. Ct. 2151, 150 L. Ed. 2d 272 (2001).

The Ninth Circuit identified the constitutional right at issue as Johnson's right to be free from an arrest not supported by probable cause. *App. at 6-7a.* However, the court misapprehended *Saucier*'s two-step process, and therefore failed to apply it correctly. The methodology the court actually applied undermines the principles upon which qualified immunity is based.

First, the Ninth Circuit improperly examined the merits of the charges against Mr. Johnson to determine that he was arrested without probable cause. A Washington court already had determined Chief Nelson *had* probable cause to arrest Mr. Johnson. *App. at 5a.* The Ninth Circuit decided Mr. Johnson did not violate the Privacy Act and therefore Chief Nelson did not have probable cause. The existence of probable cause, though, is not dependent upon the outcome of the subsequent criminal proceedings, and neither should the determination of whether the arrest violated Mr. Johnson's constitutional rights.

Second, the Ninth Circuit improperly relied on the 1988 Attorney General Opinion. Non-decisional, non-precedential legal commentary should not define the boundaries of constitutional rights, and does not provide public officials with "fair warning" that their conduct is prohibited.

Third, the Ninth Circuit's analysis resolved a true issue of first impression under Washington's Privacy Act. By definition, cases of first impression cannot recognize a right as previously being "clearly established." While the Ninth Circuit disagreed with Chief Nelson that the Privacy Act could have prohibited Mr. Johnson's actions, it made no finding that Chief Nelson's belief at the time of the arrest or his subsequent arguments were frivolous or obviously wrong in light of settled precedent. The right the Ninth Circuit recognized could not, therefore, previously have been "clearly established."

The Ninth Circuit's qualified immunity analysis has altered this Court's prior pronouncements on the function and purpose of the qualified immunity doctrine in such a way so as to call for review by this Court. Certiorari is warranted in this case so that this Court may settle the important issues raised by the Ninth Circuit's misapprehension of qualified immunity analysis and resolve the implicit conflicts with prior decisions created by the Ninth Circuit's decision in this case.

1. When liability under § 1983 is premised on an arrest allegedly made without probable cause, a constitutional violation is not established by proof that the plaintiff did not violate the law the police officer relied upon in making the arrest.

On consideration of the first prong of the *Saucier* test (whether a constitutional right had been violated), the Ninth Circuit's majority opinion is notable for what it did not consider. Johnson had asserted that Chief Nelson was liable to him under § 1983 because the Chief arrested him without probable cause in violation of the Fourth Amendment.

App. at 6a. But the Ninth Circuit did not actually consider whether Johnson's arrest was supported by probable cause; that is, whether Chief Nelson had a reasonable belief, evaluated in light of his experience and the practical considerations of everyday life, that Johnson had committed, was committing, or was about to commit a crime. *App. at 7a.* Instead, the Ninth Circuit concluded that Johnson had demonstrated a constitutional violation because, in its estimation, his conduct was not criminal under the Privacy Act.

The court's analysis is critically flawed. To make a prima facie case under § 1983 a plaintiff must show that a public official deprived him of a specific right secured by the Constitution. *Parratt v. Taylor*, 451 U.S. 527, 535, 101 S. Ct. 1908, 68 L. Ed. 2d 420 (1981), *overruled in part on other grounds by Daniels v. Williams*, 474 U.S. 327, 106 S. Ct. 1908, 88 L. Ed. 2d 662 (1986). The Ninth Circuit's holding that that Johnson did not violate the Privacy Act does not necessarily establish that he was arrested without probable cause in violation of the Fourth Amendment. The lawfulness of an arrest is not dependent upon the outcome of the subsequent criminal proceedings. "The amount of evidence required to establish probable cause to arrest is less than that necessary to support a conviction and, thus, the fact that the charges against plaintiff were dismissed does not necessarily mean that probable cause was lacking for his arrest." *Martin v. Rodriguez*, 154 F. Supp.2d 306, 312 (D. Conn. 2001).

> In determining whether probable cause existed, the applicable legal test is an objective one, similar to that used in negligence cases. If a law enforcement officer is reasonable in concluding

> that an arrestee is guilty of a particular offense based on facts and circumstances which are available and obvious to such an officer, then any arrest made is with probable cause and therefore lawful. The authorities are clear that a dismissal of charges or an acquittal after an arrest are not dispositive of the lawfulness of the arrest itself. Indeed, such a disposition in favor of the arrestee is actually irrelevant on the issue of whether an arrest was either with or without probable cause.

Smith v. Swoope, 351 F. Supp. 159, 163 (W.D. Va. 1972).

In *Hunter v. Bryant*, 502 U.S. 224, 112 S. Ct. 534, 116 L. Ed. 2d 589 (1991) (per curiam), this Court had occasion to consider the qualified immunity claims of two secret service agents who had arrested a citizen for making threats against then-President Ronald Reagan. In ruling that the agents were entitled to immunity, this Court perhaps sidestepped the very issue present in this case – whether and to what extent a court should interpret or examine the law underlying the basis for an arrest. *See id.* at 229-30 (Stevens, J., dissenting)

> The question in this case is *not* whether a reasonable officer could have believed that respondent posed a threat to the life of the President. . . . The question that is presented . . . is whether a reasonable trained law enforcement officer could have concluded that the evidence available to petitioners at the time they arrested respondent constituted probable cause to believe that he had committed the crime of threatening the life of President Reagan.

The refinement of the issue expressed by Justice Stevens in his dissent in *Hunter* represents not only the error committed by the Ninth Circuit, but also the significance of that error to qualified immunity cases addressing the issue of probable cause. A Fourth Amendment violation is not conclusively established by proof that an underlying crime was not committed. This is especially true in cases such as this, where the crime is a matter of state law. Otherwise, the stated purpose of § 1983 to provide "vindication of constitutional guarantees" is rendered meaningless.

This Court has implicitly recognized the distinction drawn by Justice Stevens in other cases, which represents the broad application of the error at issue here. For example, in *Saucier*, this Court considered an argument that a qualified immunity analysis is duplicative in an excessive force case because the inquiries into each employ a reasonableness standard. *Id.* at 203. This Court, as it had done previously in *Anderson v. Creighton*, 483 U.S. 635, 107 S. Ct. 3034, 97 L. Ed. 2d 523 (1987), rejected such an argument, holding that qualified immunity applies in the Fourth Amendment's reasonableness context "just as it would for any other claim of official misconduct." *Id.* (citing *Anderson*, 483 U.S. at 644). This holding was made in the context of the second step of the qualified immunity analysis, but as is evident from the Ninth Circuit's majority opinion, this admonition should apply with equal force to the first step as well.

This Court has previously recognized "that it is inevitable that law enforcement officials will in some cases reasonably but mistakenly conclude that probable cause is present[.]" *Anderson*, 483 U.S. at 641. In such a case, "those officials – like other officials who act in ways they reasonably believe to be lawful – should not be held personally liable." *Id.* In a

wrongful arrest case, as in an excessive force case, if the question of whether a police officer is entitled to qualified immunity depends upon whether the plaintiff actually committed the crime for which he was arrested, a police officer could never make a reasonable mistake as to the legality of his arrest if it were later determined that a crime had not occurred. No authority supports such a proposition. And, this Court's opinions in *Saucier* and *Anderson* have soundly rejected any attempts by federal courts to set up such a scenario. *See Saucier*, 533 U.S. at 203 ("In *Anderson*, a warrantless search case, we rejected the argument that there is no distinction between the reasonableness standard for warrantless searches and the qualified immunity inquiry.").

It was unnecessary and improper for the Ninth Circuit to have definitively resolved the issue of whether Johnson violated the Privacy Act. In a § 1983 case, the merits of the underlying claim must be kept separate from the qualified immunity analysis because "[t]he concern of the immunity inquiry is to acknowledge that reasonable mistakes can be made as to the legal constraints on particular police conduct." *Saucier*, 533 U.S. at 205. "If the officer's mistake as to what the law requires is reasonable, . . . the officer is entitled to the immunity defense." *Id.* The Ninth Circuit's analysis forecloses the reasonableness inquiry.

In lieu of finding whether a constitutional right had been violated, the Ninth Circuit determined Johnson did not violate the Privacy Act. This method of analysis reduced the determination of the existence of a constitutional right to a determination of whether the criminal charges could be sustained. Admittedly, the criminal charges against Johnson were dismissed by the Clallam County District Court, but that did not occur until after a finding of probable has also

been made. When a § 1983 case is premised on a wrongful arrest, a constitutional right is violated only if that arrest is made without probable cause, not if the arrest can be sustained as a matter of law. The Ninth Circuit failed to appreciate this distinction. This case presents this Court with the opportunity to clarify *Hunter* and define for future cases the standards by which the existence of probable cause is determined in a qualified immunity case.

2. A constitutional right may not be clearly established by non-decisional and non-precedential legal commentary.

The Ninth Circuit's reliance upon the 1998 opinion from Washington's then-Attorney General cannot be justified given its obligation to determine whether the unlawfulness of a particular action was apparent in light of pre-existing law. *Anderson v. Creighton*, *supra*, 483 U.S. at 640. Washington courts routinely reject attempts by litigants to rely on attorney general opinions because such opinions are not binding precedent. *See Branson v. Port of Seattle*, 115 Wn. App. 695, 699, 63 P.3d 830 (2003), *aff'd*, 152 Wn.2d 862, 101 P.3d 67 (2004) (rejecting attorney general opinion as not binding and because its interpretation of a statute is too narrow); *City of Pasco v. Dep't of Retirement Sys.*, 110 Wn. App. 582, 592 n.11, 42 P.3d 992, *rev. denied*, 147 Wn.2d 1017, 56 P.3d 992 (2002) ("Not only does this [attorney general opinion] not comport with the facts here, but it also does not control our decision. Attorney General Opinions are not binding on the court and we may disregard them.").

Qualified immunity operates "to ensure that before they are subjected to suit, officers are on notice that their conduct is unlawful." *Saucier*, 533 U.S. at 206. This Court has

consistently recognized that this notice must come in the form of case law. *See, e.g., Harlow v. Fitzgerald*, 457 U.S. 800, 818, 819, 102 S. Ct. 2727, 73 L. Ed. 2d 396 (1982) (the objective legal reasonableness of a public official's actions must be assessed in light of *clearly established law*); *Anderson v. Creighton*, 483 U.S. at 640 (unlawfulness of official action must be apparent in light of *pre-existing law*); *United States v. Lanier*, 520 U.S. 259, 269, 117 S. Ct. 1219, 137 L. Ed. 2d 432 (1997) (*prior decisions* must give reasonable warning to public official that conduct violates constitutional rights).

> The general rule of qualified immunity is intended to provide government officials with the ability "reasonably [to] anticipate when their conduct may give rise to liability for damages." Where that rule is applicable, officials can know that they will not be held personally liable as long as their actions are reasonable in light of current American law.

Anderson, 483 U.S. at 646 (internal citation omitted).

In *Anderson*, this Court rejected the respondents' attempt to rely on English common law for a *per se* rule that a police officer is not entitled to qualified immunity if he conducts an unlawful warrantless search of an innocent third party's home in search of a fugitive. *Id.* at 644, 646. Specifically, this Court held that the security provided to police officers in the form of qualified immunity "would be utterly defeated if officials were unable to determine whether they were protected by the rule without entangling themselves in the vagaries of the English and American common law." *Id.* at 646. In this case, the Ninth Circuit's reliance on the

1988 Attorney General Opinion has the same effect of defeating the assurance guaranteed to police officers through qualified immunity. A public official is entitled to qualified immunity unless the unlawfulness of his acts is apparent in light of pre-existing law. *Anderson, supra,* 483 U.S. at 640 (and cases cited therein). The unlawfulness of an action can hardly be said to be apparent if a lower court is entitled to rely on legal commentary that is not binding, has no precedential value, and may actually be rejected by courts.

The objective of qualified immunity is to inquire whether a public official acted reasonably in light of the settled law governing the circumstances, not whether another reasonable, or more reasonable, interpretation of events can later be constructed. *Hunter v. Bryant, supra,* 502 U.S. at 227-28. In this sense, then, it is important for lower courts to appreciate the caliber of legal standards they rely upon to find whether an alleged constitutional right is clearly established. Extending that caliber beyond decisional case law places an unfair, perhaps insurmountable, burden upon public officials to familiarize themselves not only with court decisions, but with commentators' impressions and opinions of trends, criticisms, and predictions of those decisions. Such an extension also creates increased concerns for municipalities in terms of their *Monell* liability. Must municipalities now train their police officers to conduct legal analysis of legal commentary such as attorney general opinions, law review, and legal treatises? Can a municipality or a police officer now be denied qualified immunity for failing to predict how the law will develop, how a court might rule on a particular issue, or whether courts will find particular commentary persuasive?

The Ninth Circuit's extension into non-case law sources of legal commentary begs the question of whether a constitutional right could ever truly be considered "clearly established" if a public official cannot be assured that his conduct will be measured by past court decisions. Allowing courts to consider legal authority other than case law turns qualified immunity into an "outcome determinative" question, meaning that

> a judge taking a broad view of the sources of authority that may be considered is more likely to favor the plaintiff's position. Conversely, judges taking a more narrow view of the sources of authority that may be considered are more likely to conclude that particular rights have not been clearly established for purposes of qualified immunity.

Stemerman, "*Unclearly Establishing Qualified Immunity: What Sources of Authority May Be Used to Determine Whether the Law Is 'Clearly Established' in the Third Circuit?*" 47 Vill L. Rev. 1221, 1249 (2002).

This Court should grant certiorari and find that lower courts may not rely on non-decisional, non-precedential, or non-binding legal commentary to find that a particular constitutional right is clearly established. Assuring public officials that their conduct will be measured only by legal precedent serves to more precisely educate officials as to the boundaries of constitutional law. Such a requirement would also give true effect to the "reasonable warning" public officials are entitled to before they are held personally liable for constitutional rights violations. *See Hope v. Pelzer*, 536 U.S. 730, 740, 122 S. Ct. 2508, 153 L. Ed. 2d 666 (2002) (citing *United States v. Lanier*, *supra*, 520 U.S. at 269).

3. A right recognized in a case of first impression cannot be considered clearly established.

A qualified immunity defense operates to provide police officers with "accommodation for reasonable error", *Hunter v. Bryant*, *supra*, 502 U.S. at 229 (citing *Davis v. Scherer*, 468 U.S. 183, 196, 104 S. Ct. 3012, 82 L. Ed. 2d 139 (1984)), and "to ensure that before they are subjected to suit, officers are on notice their conduct is unlawful." *Saucier*, 533 U.S. at 206. A federal court oversteps the boundaries of qualified immunity when it goes beyond merely examining the state of the law and actually creates a rule of law that had not previously existed.

In this case, the Ninth Circuit should have asked whether a reasonable officer could have believed that probable cause existed to arrest Johnson for violating the Privacy Act. *Hunter*, *supra*, 502 U.S. at 228. Instead, the Ninth Circuit took it upon itself to resolve the issue of whether Johnson violated the Privacy Act under a factual scenario that had not yet been considered by the Washington State Supreme Court. It defies the very purpose of qualified immunity if a federal court may hold that a constitutional right is "clearly established" when it resolves a meritorious issue of state statutory interpretation under facts which would be a matter of first impression for that state's supreme court. The Sequim defendants' objection to the Ninth Circuit's application of the "clearly established" rule is not merely a issue of semantics. There is a distinct difference in a federal court clearly establishing a right, versus merely determining whether a right is clearly established. This Court's precedents fall squarely on the latter. Here, however, the Ninth Circuit engaged in the former and, in doing so, overstepped its bounds on qualified immunity.

This is not to say that a police officer is entitled to qualified immunity in every instance where the unique factual circumstances of the case had not yet been applied to existing law. *See Hope v. Pelzer*, 536 U.S. at 741. This Court has recognized that in a "obvious case" the standards can be clearly established even without a body of relevant case law. *Brosseau*, __ U.S. __, 125 S. Ct. at 600. One may not manufacture an issue of first impression with frivolous argument merely to circumvent clearly established law. Similarly, this Court has recognized that that in the course of determining one case, principles may be set forth "which will become the basis for a holding that a right is clearly established." *Saucier*, 533 U.S. at 201. Indeed, that is the purpose for the first step in the *Saucier* analysis. *Id.* ("The law might be deprived of this explanation were a court simply to skip ahead to the question whether the law clearly established that the officer's conduct was unlawful in the circumstances of the case.")

This case presented none of those circumstances. This case presented the Ninth Circuit with a true issue of first impression, a true issue of statutory interpretation that had yet to be considered by a court inside or outside the context of a qualified immunity claim. The issues presented were not constructs void of reasonable basis in fact or law. *Flora* was fact specific and not clearly applicable. Under the circumstances, the Ninth Circuit was limited to elaborating the law for future guidance, not both elaborating and declaring it clearly established on the premises alleged. *See, e.g., Brosseau*, __ U.S. __, 125 S. Ct. at 600 (prior cases that are fact-specific and do not "squarely govern[]" the instant case "by no means 'clearly establish' that [the officer's] conduct violated the Fourth Amendment"). A federal constitutional right simply cannot be "clearly

established" if that right had not been recognized before the alleged constitutional violation.

The right Chief Nelson is alleged to have violated must be clearly established in a particularized and relevant sense. *Anderson*, 483 U.S. at 640. The holding of *Flora* (or even *Alford*) does not definitively establish the contours of a police officer's right of privacy in the performance of his official duties when a citizen attempts to inject himself and his video camera into a police investigation of a juvenile runaway that does not at all concern that citizen. Yet this is the scenario faced by Chief Nelson when he made the decision to arrest Johnson. The relevant and particularized rule announced in *Flora* and *Alford* is whether a police officer would have probable cause to arrest an individual attempting to record or intercept an interaction between him and a police officer that both concerned that citizen and was initiated by the police officer. There is nothing in either of these cases that should have alerted Chief Nelson to the obvious unconstitutionality of his arrest. *Cf. Brosseau*, __ U.S. __, 125 S. Ct. at 599. The Ninth Circuit's extension of *Flora* to the facts of this case creates a rule of law that did not exist prior to this case.

Whether Chief Nelson is entitled to qualified immunity turns on the objective legal reasonableness of his act "assessed in light of the legal rules that were 'clearly established' at the time it was taken." *Anderson*, 483 U.S. at 639 (internal citations omitted). It is neither necessary nor proper for the Ninth Circuit to have resolved a state law issue of first impression under the guise of determining whether a clearly established constitutional right had been violated. Certiorari should be granted so that this Court can announce a rule to guide lower courts when they, in considering whether an issue of first impression constitutes a clearly established

right, must not only identify the right at issue, but also ascribe a level of certainty to that right.

CONCLUSION

The petitioners respectfully request this Court grant their petition for a writ of certiorari.

Respectfully submitted,

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APPENDIX

APPENDIX A — AMENDED OPINION AND ORDER AND DENIAL OF REHEARING OF THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT FILED AUGUST 31, 2004

UNITED STATES COURT OF APPEALS NINTH CIRCUIT

No. 03-35057.

Argued and Submitted March 30, 2004.
Filed Aug. 31, 2004.
Amended Oct. 25, 2004.
As Corrected Nov. 8, 2004.

Anthony L. **JOHNSON**,

Plaintiff-counter-defendant-Appellant,

v.

W.J. HAWE, Sheriff, individually and in his official capacity; John Doe 1-10; Clallam County, a municipal corporation,

Defendants-Appellees,

City of Sequim, a municipal corporation; Byron Nelson, Jr., Chief, individually and in his official capacity as Police Chief of the City of Sequim and his marital community; Bill Thomas, individually and in his capacity as Mayor of Sequim, and his marital community,

Defendants-counter-claimants-Appellees.

Appendix A

Appeal from the United States District Court for the Western District of Washington; J. Kelley Arnold, Magistrate, Presiding. D.C. No. CV-00-05354- JKA.

Before CANBY, JR., *WARDLAW*, and *GOULD*, Circuit Judges.

ORDER AND DENIAL OF REHEARING

Appellee Clallam County's motion for clarification of opinion is GRANTED.

The Opinion and dissent filed August 31, 2004, slip op. 12391, and appearing at 382 F.3d 944 (9th Cir.2004) are hereby AMENDED. The Clerk shall file the attached Amended Opinion and Amended Dissent.

A majority of the panel has voted to deny the petition for panel rehearing and the petition for rehearing en banc. Judge Gould would have granted the petition. The full court has been advised of the petition for rehearing en banc and no judge requested a vote on whether to rehear the matter en banc. *Fed. R.App. P. 35.*

The petition for panel rehearing and the petition for rehearing en banc are DENIED.

Appendix A

AMENDED OPINION

WARDLAW, Circuit Judge:

In this *section 1983* action Anthony L. Johnson appeals the grant of summary judgment predicated on qualified immunity for his arrest by the City of Sequim Police Chief Byron Nelson for a violation of Washington's Privacy Act, *Wash. Rev.Code § 9.73.030* (the "Privacy Act"). Because it was clearly established under Washington law at the time of the arrest that recording a police officer in the performance of his public duties was not a violation of the Privacy Act and it was unreasonable for Chief Nelson to believe otherwise, we hold that the Chief is not entitled to qualified immunity. Moreover, because Chief Nelson could not have had any reasonable expectation of privacy in the communications by others over the police radio dispatch system, which was the basis for his Privacy Act arrest of Johnson, the arrest violated Johnson's Fourth Amendment right to be free of arrest without probable cause. And because Johnson submitted evidence supporting his claim of *Monell* liability against the City, summary judgment was not warranted on any ground relied upon by the district court. We therefore reverse and remand for further proceedings.

I

The undisputed facts show that on January 28, 2000, Johnson was videotaping several of his friends at Sequim's public skateboard park when he noticed Chief Nelson drive up to the park in his patrol vehicle. Chief Nelson, who was on duty and had come to the park to look for a missing

juvenile, stopped his patrol car in the park's parking lot about seventy-five feet away from where Johnson was standing on an elevated cement ramp. From this distance, Chief Nelson observed Johnson videotaping him as he sat in his vehicle with his driver's side window rolled down. After a short time, Johnson stopped recording Chief Nelson and approached the car. As Johnson approached, Chief Nelson's police radio "was operating" and he was "dialing [his] cellular phone" to contact dispatch to obtain a description of the runaway he was attempting to locate. Johnson resumed videotaping when he reached the rear of the car. As Johnson came around to the passenger side of the car, Chief Nelson rolled down the passenger window, deactivated his cellular phone, and asked Johnson "What do you think you're doing?" Although Johnson stopped recording Chief Nelson, he continued to point his video camera at Chief Nelson, who twice told Johnson to stop because Johnson "did not have [ ] permission to record [him] and . . . it was a violation of the law to record conversations without consent." After the second warning, Chief Nelson got out of his car and "contacted" with Johnson, physically struggling with him to obtain the video camera. With the assistance of another officer, whom he had called for backup, Chief Nelson placed Johnson under arrest and transported him to the Clallam County Jail in Port Angeles.

After Johnson had spent three days in county jail, prosecutors filed a criminal complaint against him, charging one count of recording communication without permission, in violation of the Privacy Act, and one count of resisting arrest. Prosecutors also moved for a determination of probable cause, based solely upon a declaration from Chief Nelson that Johnson videotaped him "while [he] was making

telephone contact with dispatch in an attempt to verify juvenile runaway information." Although the state court found probable cause for the arrest, Johnson was released and the charges were dropped. Nearly two months later, prosecutors again filed charges against Johnson, this time for "attempted recording communication without permission" and for resisting arrest.

On May 10, 2000, Judge Coughenour of the Clallam County District Court dismissed the charges against Johnson. Judge Coughenour found that Chief Nelson was not engaged, by cellular phone or police radio, in any conversation or communication with anyone while Johnson was recording him, and that Johnson therefore could not have "inten[ded] to record a conversation that [was not] occurring." Moreover, Judge Coughenour found that even if Chief Nelson had been involved in a communication in his vehicle, there was no expectation of privacy because he had voluntarily exposed any such communication to the public by parking his vehicle in a public place with the windows rolled down.

On June 16, 2000, Johnson filed this action pursuant to *42 U.S.C. § 1983* action against the City of Sequim, Chief Nelson, Sequim's Mayor, several Doe officers, Clallam County, and the County Sheriff, seeking a declaration that he had been arrested, incarcerated, and prosecuted in violation of his First and Fourth Amendment rights. He also sought injunctive relief, monetary damages, and attorney's fees pursuant to *42 U.S.C. § 1988(b)*. Chief Nelson and the other individual defendants filed counterclaims against Johnson for malicious prosecution under *Wash. Rev.Code § 4.24.350(2)*. Ruling on cross motions for summary

judgment on Johnson's claims, Magistrate Judge Arnold granted judgment for defendants and dismissed Johnson's claims. After defendants voluntarily dismissed their counterclaims, Johnson appealed.

II

We review *de novo* the district court's decision to grant or deny summary judgment. *See United States v. City of Tacoma,* 332 F.3d 574, 578 (9th Cir.2003). Viewing the evidence in the light most favorable to the nonmoving party, we determine whether any genuine issue of material fact exists and whether the district court correctly applied the law. *Id.* We review *de novo* the district court's finding of qualified immunity. *Sorrels v. McKee,* 290 F.3d 965, 969(9th Cir.2002).

III

"The elements of a section 1983 action are: (1) that the conduct complained of was committed by a person acting under color of state law; and (2) that the conduct deprived a person of rights, privileges, or immunities secured by the Constitution or laws of the United States." *Alford v. Haner,* 333 F.3d 972, 975-76 (9th Cir.2003) (citation and internal quotation marks omitted). It is undisputed that Chief Nelson was acting under color of state law when he arrested Johnson.

As to the second element of his *section 1983* claim, Johnson asserts that Chief Nelson arrested him without probable cause, in violation of the Fourth Amendment. *See Beck v. Ohio,* 379 U.S. 89, 91, 85 S.Ct. 223, 13 L.Ed.2d 142

(1964). Probable cause exists when the arresting officer has "a reasonable belief, evaluated in light of the officer's experience and the practical considerations of everyday life, that a crime has been, is being, or is about to be committed."; *Hopkins v. City of Sierra Vista,* 931 F.2d 524, 527 (9th Cir.1991) (citation and internal quotation marks omitted). Johnson argues that there was no reasonable basis for Chief Nelson to believe his videotaping was criminal under the Privacy Act because (1) the Act does not apply to recordings of communications that police officers make "in the course of performing their official and public duties[,]" *State v. Flora,* 68 Wash.App. 802, 845 P.2d 1355, 1357 (1992); and (2) there was no reasonable expectation of privacy in the police radio communications in any event because they were "knowingly expose[d]" to the public, *Katz v. United States,* 389 U.S. 347, 351, 88 S.Ct. 507, 19 L.Ed.2d 576 (1967). Defendants assert they are entitled to qualified immunity.

The first inquiry in conducting a qualified immunity analysis is: "Taken in the light most favorable to the party asserting the injury, do the facts alleged show the officer's conduct violated a constitutional right?" *Saucier v. Katz,* 533 U.S. 194, 201, 121 S.Ct. 2151, 150 L.Ed.2d 272 (2001). "In the course of determining whether a constitutional right was violated on the premises alleged, a court might find it necessary to set forth principles which will become the basis for a holding that a right is clearly established. This is the process for the law's elaboration from case to case." *Id.* "[I]f a violation could be made out . . . , the next, sequential step is to ask whether the right was clearly established." *Id.* This second inquiry "must be undertaken in light of the specific context of the case," to discern whether "[t]he

contours of the right [are] sufficiently clear that a reasonable official would understand that what he is doing violates that right." *Id. at 201, 202, 121 S.Ct. 2151.* If the answer to both of these inquiries is yes, qualified immunity may still be appropriate if the officer had a "reasonable, but mistaken, belief[ ] as to the facts establishing the existence of probable cause ... [and] the legality of [his] actions." *Id. at 206, 121 S.Ct. 2151.*

A

Defendants do not assert either that Chief Nelson had a privacy interest in his conversation with Johnson during their encounter or that he was involved in a private cellular phone conversation while Johnson videotaped him. Thus, the sole basis for the district court's qualified immunity determination is that Chief Nelson's "communications with others on his police radio" were private, and thus he had a reasonable belief that probable cause existed to arrest Johnson for recording those communications without his consent.

Washington's Privacy Act provides:

> (1) Except as otherwise provided in this chapter, it shall be unlawful for any individual ... to intercept, or record any:
>
> (a) Private communication transmitted by telephone, telegraph, radio, or other device between two or more individuals between points within or without the state by any device electronic or otherwise designed to record and/or transmit

> said communication regardless how such device is powered or actuated, without first obtaining the consent of all the participants in the communication;
>
> (b) Private conversation, by any device electronic or otherwise designed to record or transmit such conversation regardless how the device is powered or actuated without first obtaining the consent of all the persons engaged in the conversation.

Wash. Rev.Code § 9.73.030(1)(a)-(b). It is well-established that non-private conversations and communications are "outside the purview of the [Privacy Act,]" *State v. D.J.W., 76 Wash.App. 135, 882 P.2d 1199, 1202 (1994)*, and that "private" has its "ordinary and usual meaning" under the Act, i.e., " 'belonging to one's self ... secret ... intended only for the persons involved (a conversation) .. . holding a confidential relationship to something ... a secret message: a private communication ... secretly: not open or in public.' " *State v. Forrester, 21 Wash.App. 855, 587 P.2d 179, 184 (1978)* (quoting Webster's Third New International Dictionary (1969) (alterations in original)). To determine whether a conversation is private, Washington courts "consider the intent or reasonable expectations of the participants as manifested by the facts and circumstances of each case." *Id.* "A person's right to keep private his affairs including his conversation depends on whether he has a reasonable expectation of privacy at the time and under the circumstances involved." *State v. Bonilla, 23 Wash.App. 869, 598 P.2d 783, 785-86 (1979) (citing Jeffers v. City of Seattle, 23 Wash.App. 301, 597 P.2d 899,*

907 (1979)). This test is similar, if not identical, to the reasonable expectation of privacy test set forth for purposes of Fourth Amendment analysis in *Katz, 389 U.S. 347, 88 S.Ct. 507*. As *Katz* held,

> [T]he Fourth Amendment protects people, not places. What a person knowingly exposes to the public, even in his own home or office, is not a subject of Fourth Amendment protection. . . . But what he seeks to preserve as private, even in an area accessible to the public, may be constitutionally protected.

Katz, 389 U.S. at 351, 88 S.Ct. 507 (citations omitted).

The Washington Supreme Court has determined that the Act's purpose is "to protect individuals from the disclosure of any secret illegally uncovered by law enforcement." *State v. Fjermestad, 114 Wash.2d 828, 791 P.2d 897, 902 (1990); see also id.* ("[T]he State's privacy act . . . deliberately places the court system between the police and private citizen to protect against this type of [electronic eavesdropping]."). Accordingly, Washington courts have refused "to transform the privacy act into a sword available for use against individuals by public officers acting in their official capacity." *Flora, 845 P.2d at 1357-58* (rejecting police officers' assertion of a privacy interest under the Act in statements they made on a public thoroughfare while effectuating an arrest). In a recent *section 1983* case involving the tape recording of a traffic stop, we quoted with approval the district court's jury instruction that:

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> "It is not a violation of the Washington Privacy Act to tape-record a police officer in the performance of an official function on a public thoroughfare. Such conversations are not 'private' under the Privacy Act. This rule of law was clearly established by Washington Courts in 1992 in the case of *State of Washington v. Flora.*"

Alford, 333 F.3d at 977. This instruction was correctly based upon *Flora* and a subsequent Washington Supreme Court case that recognized "a conversation on a public thoroughfare in the presence of a third party and within the sight and hearing of passersby is not private" under the Act. *State v. Clark, 129 Wash.2d 211, 916 P.2d 384, 392 (1996)* (discussing *Flora, 845 P.2d at 1355).*

"Determining whether a particular conversation is private is a question of fact. However, where the pertinent facts are undisputed and reasonable minds could not differ on the subject, the issue of whether a particular conversation is private may be determined as a matter of law." *D.J.W., 882 P.2d at 1202* (citations omitted). The district court ruled as a matter of law that the police radio communications were private based upon Chief Nelson's reasonable expectation of privacy and the fact that he "was not engaging in [them] in a public way." We disagree for three reasons.

First, the Privacy Act does not criminalize the recording of a "police officer in the performance of an official function on a public thoroughfare." *Alford, 333 F.3d at 977* (citing the district court's jury instructions). The district court's limitation of *Flora*'s application to communications "involv

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[ing] the arrest subject . . . made in the presence of third parties with no expectation of privacy" was in error. *Flora*'s underlying principle is that the Privacy Act is not to be "transform[ed] . . . into a sword available for use against individuals by public officers acting in their official capacity." *Flora*, 845 P.2d at 1358. The language "public officers acting in their official capacity" does not exclude any conduct other than an actual arrest, but encompasses other conduct that is public and official. *See id. at 1357* ("The State urges us to adopt the view that public officers performing an official function on a public thoroughfare in the presence of a third party and within the sight and hearing of passersby enjoy a privacy interest which they may assert under the statute. We reject that view as wholly without merit."). In *Alford* itself, we applied *Flora* to the recording of statements made by police in public during a traffic stop and found there was not probable cause to arrest under the Privacy Act. *333 P.3d at 676, 678*. It is undisputed that Johnson recorded Chief Nelson while he was on duty performing an official function in a public place. Under *Flora* and *Alford*, Johnson did not violate the Privacy Act when he recorded this official, public activity.

Second, there was no reasonable expectation of privacy in the police radio communications because Chief Nelson "knowingly expose[d]" them to the public. *Katz, 389 U.S. at 351, 88 S.Ct. 507*. It is undisputed that (1) Chief Nelson's police radio "was operating" as he sat in his police cruiser in the parking lot of a public park with his driver's side window rolled down; (2) Chief Nelson was aware that Johnson was videotaping him as Johnson approached the vehicle; (3) Chief Nelson did not roll up his window as Johnson approached; *684 and (4) when Johnson reached the passenger side of

the cruiser, Chief Nelson rolled down that window to speak to Johnson. This conduct does not reflect an intent to keep the radio communications private; it belies any assertion that the Chief expected the radio communication to remain private. With his window rolled down in a public parking lot, Chief Nelson's police radio communications were "within the . . . hearing of passersby" such as Johnson and other members of the public, and thus could not be private under the Act. *State v. Clark, 916 P.2d at 392.* If Chief Nelson had wished to keep the radio communications from the public, he should have rolled up the driver's window, and refrained from rolling down a second window, where Johnson was standing next to the car with his video camera pointed inside.

Third, there is no reasonable expectation of privacy in communications over police dispatch radio in any event because those communications are knowingly exposed to the public by virtue of their transmission. For example, addressing the question "whether the participants in a conversation between 911 Central Dispatch and law enforcement or fire personnel have a reasonable expectation that their conversations are of a private nature [under the Privacy Act]," the Washington Attorney General stated in a 1988 Opinion:

> First, we understand that a large percentage of conversations between 911 Central Dispatch and law enforcement or firefighting officers is radio communication, commonly monitored by other officers and by private citizens owning devices that scan the radio frequencies used by police and fire agencies. In our opinion, the participants in a

> conversation that can be readily overheard and recorded by the general public do not have a reasonable expectation of privacy in their conversation.
>
> Second, even where a conversation is not "public" in that it is not monitored or heard by the public, it may be "public" in that the subject of the conversation is strictly of a public business nature. We assume that virtually all conversations between 911 Central Dispatch and public officers are official, public business conversations.

Op. Wash. Att'y Gen. No. 11 (1988), *available at 1988 WL 404817, at *2-3*. In a factually similar case, Oregon's intermediate appellate court similarly ruled:

> [T]he trial court erred in its conclusion that the police radio broadcast was not "for the use of the general public." The police had no property or privacy interest in it. It is undisputed that it was transmitted on a frequency that was accessible to the public, who could listen without subscription, payment or other hindrance. The scanner that defendant used to receive the message was for sale at K-Mart and Radio Shack stores. Although the police intended that the broadcast be for police use, the message was not coded or scrambled, and the police knew that the public could listen to it. The public could understand the content of the message without the use of special equipment, even though police officers were

identified by number rather than by name. The broadcast was "for the use of the general public" within the meaning of the exception in ORS 165.540(4). Defendant committed no crime when she tape recorded the police radio broadcast.

State v. Bichsel, 101 Or.App. 257, 790 P.2d 1142, 1144 (1990); cf. United States v. Basey, 816 F.2d 980, 993 n. 21 (5th Cir.1987) ("And, apart from specific statutory protections, there is no reasonable expectation of privacy in broadcasts over the public airwaves which are exposed to everyone in the area having a radio tuned to the same nonexclusive channel.") (citing *United States v. Hoffa, 436 F.2d 1243, 1247 (7th Cir.1970)); Edwards v. Bardwell, 632 F.Supp. 584, 589 (M.D.La.), aff'd 808 F.2d 54 (5th Cir.1986)* (stating that there is no reasonable expectation of privacy in a communication broadcast via radio). Because the communications over Chief Nelson's police radio could be commonly monitored, overheard, and recorded by other officers and private citizens owning scanning devices, there was no reasonable expectation of privacy in those communications.

Therefore we conclude that Johnson was arrested without probable cause in violation of the Fourth Amendment because his conduct was not criminal under the Act.

B

We next examine whether the contours of Johnson's Fourth Amendment right in this context were sufficiently clearly established at the time of Johnson's arrest to defeat

the Chief's claim of qualified immunity. We hold that the law was sufficiently established so that Chief Nelson reasonably should have known that he had no lawful basis to arrest Johnson for violating the Privacy Act.

The principles of *Flora* and its progeny were well-established at the time of Johnson's arrest. At the very least, these cases stand for the following two propositions: (1) "public officers performing an official function on a public thoroughfare in the presence of a third party and within the sight and hearing of passersby [do not] enjoy a privacy interest which they may assert under the statute"; and (2) the Privacy Act may not be "transform[ed] . . . into a sword available for use against individuals by public officers acting in their official capacity." *Flora, 845 P.2d at 1357-58.* Any reasonable officer should have understood these rules to preclude Johnson's arrest under the circumstances. Although *Flora* involved officer statements made during an arrest, no subsequent authority limited its reach to those facts. Moreover, *Flora*'s plain language suggests a broader application sufficient to preclude Chief Nelson from arresting Johnson for recording him during the performance of his official duties in public. Moreover, in light of the many Washington cases dealing with unlawful arrests under the Privacy Act, a reasonable police officer should have been aware of the 1998 Washington Attorney General's Opinion No. 11, which determines that communications over police dispatch radio are not private. *See 1988 WL 404817, at *2-3.* Finally, even if these two points were not sufficiently clear to preclude Johnson's arrest, any reasonable officer should have known under the well-established precedent of *Katz* that there could be no reasonable expectation of privacy in

the police radio transmissions which Chief Nelson knowingly exposed to the public through his open car windows. No exigent circumstances existed in this case that could justify a reasonable mistake on the part of chief Nelson. *See Saucier, 533 U.S. at 206, 121 S.Ct. 2151.*

Therefore defendants are not entitled to qualified immunity. The district court's entry of summary judgment on that basis is reversed.[1]

IV

The district court rejected Johnson's municipal liability claim under *Monell v. Dep't of Soc. Servs. of City of New York, 436 U.S. 658, 98 S.Ct. 2018, 56 L.Ed.2d 611 (1978),* on the basis that Johnson "had set forth no evidence to support the establishment of a policy or custom" which the Chief followed in arresting Johnson. This ruling is incorrect because Johnson submitted the declaration of law enforcement expert

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1. Summary judgment was also inappropriate on a second ground. A genuine issue of material fact exists as to whether Johnson recorded any conversation or communication at all. As Judge Coughenour pointed out when he dismissed the charges against Johnson, the evidence establishes only that Chief Nelson's police radio "was operating" while Johnson videotaped him. In addition, Johnson submitted a videotape in support of his motion for summary judgment which reveals Chief Nelson sitting silently in his police cruiser while he supposedly was engaged in conversation over his cellular phone. Viewed in the light most favorable to Johnson, this evidence suggests there was no conversation or communication taking place while Johnson videotaped Chief Nelson, and thus there was no reasonable basis to arrest him for recording a communication that did not take place.

Alan H. Baxter. Baxter opined that the Sequim Police Department's "self-training" program, which assigned responsibility to the individual officer for keeping abreast of recent court decisions involving law enforcement, amounted to a "failure to train" Sequim police officers about enforcement of suspected violations of the Privacy Act.

Under *City of Canton v. Harris, 489 U.S. 378, 380, 109 S.Ct. 1197, 103 L.Ed.2d 412 (1989)*, the Department's failure to train its officers about the Privacy Act may amount to "deliberate indifference" toward unlawful arrests under its provisions. As the Supreme Court has explained:

> [A] violation of federal rights may be a highly predictable consequence of a failure to equip law enforcement officers with specific tools to handle recurring situations. The likelihood that the situation will recur and the predictability that an officer lacking specific tools to handle that situation will violate citizens' rights could justify a finding that policymakers' decision not to train the officer reflected "deliberate indifference" to the obvious consequence of the policymakers' choice—namely, a violation of a specific constitutional or statutory right. The high degree of predictability may also support an inference of causation—that the municipality's indifference led directly to the very consequence that was so predictable.

Bd. of Cty. Comm'rs v. Brown, 520 U.S. 397, 409-10, 117 S.Ct. 1382, 137 L.Ed.2d 626 (1997) (discussing *Canton*).

In light of the many Washington cases addressing enforcement of the Privacy Act by public officers performing official duties, Johnson's evidence creates at least a genuine issue as to whether "self-training" in this context amounted to deliberate indifference.

In its municipal liability analysis, the district court failed to address either Johnson's "failure to train" theory of municipal liability or expert Baxter's supporting opinions. The district court also did not rule on defendants' motion to strike expert Baxter's declaration for Johnson's alleged failure to comply with his expert witness disclosure and discovery obligations under Federal Rule of Civil Procedure 26. We decline to reach these issues in the first instance, and direct the district court to address them upon remand.[2]

V

The district court erroneously dismissed Johnson's state law outrage claim for failure to state a prima facie case, ruling: "[T]here is nothing unusual about the acts of the defendants as law enforcement officers, nor is there any indication that the acts viewed in a light most favorable to[Johnson] would generate severe emotional distress. No reasonable juror could find otherwise."

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2. Johnson also claims that Clallam County, with Sheriff W.J. Hawe as its policy-making official, is liable under *Monell* for what he describes as the County's policy of "incarceration without question." On March 12, 2001, the district court granted summary judgment in favor of Clallam County and Sheriff Hawe. Because Johnson's claims against the County and Sheriff Hawe are without merit, we affirm the grant of summary judgment in their favor.

The dismissal was in error. "To state a claim for the tort of outrage or intentional infliction of emotional distress, a plaintiff must show '(1) extreme and outrageous conduct; (2) intentional or reckless infliction of emotional distress; and (3) actual result to the plaintiff of severe emotional distress.' " *Seaman v. Karr, 114 Wash.App. 665, 59 P.3d 701, 710 (2002)* (*quoting Birklid v. Boeing Co., 127 Wash.2d 853, 904 P.2d 278, 286 (1995)*). The determination of whether conduct is outrageous is ordinarily a jury question, but the court must initially "determine if reasonable minds could differ on whether the conduct was so extreme as to result in liability." *Id.* In light of our holding that Chief Nelson arrested Johnson for recording "private" communications for which there was no reasonable expectation of privacy, reasonable minds could surely differ on whether that conduct amounted to more than "mere annoyance, inconvenience, or normal embarrassment," and the issue must go to a jury. *Brower v. Ackerley, 88 Wash.App. 87, 943 P.2d 1141, 1149 (1997).*

VI

Johnson also seeks a declaration that *Wash. Rev.Code § 4.24.350*, the basis for defendants' malicious prosecution counterclaims, violates the First and Fourth Amendments because it affords greater protection from unfounded lawsuits to public officials than is afforded to other citizens. Johnson's claim is moot because defendants dismissed their malicious prosecution claims and represented at oral argument that they would not pursue those claims in the future. Thus there is no actual controversy between the parties with respect to any malicious prosecution claim under *§ 4.24.350*, and we affirm the district court's dismissal of Johnson's constitutional

challenges to the statute. *See, e.g., Bernhardt v. County of Los Angeles, 279 F.3d 862, 871 (9th Cir.2002); Seven Words LLC v. Network Solutions, 260 F.3d 1089, 1094-95 (9th Cir.2001).*[3]

3. Johnson also claims for the first time in this appeal that his arrest was an impermissible content-based restriction on his speech rights in violation of the First Amendment. Because he did not raise this claim before the district court and there are no extraordinary circumstances which would justify deciding this claim in the first instance on appeal, we deem it waived. *See Keenan v. Allan, 91 F.3d 1275, 1278 n. 4 (9th Cir.1996).*

REVERSED in part, **AFFIRMED** in part, and **REMANDED** for further proceedings consistent with this opinion.

GOULD, Circuit Judge, dissenting:

I respectfully dissent, believing that the majority extends Washington law, as expressed in *State v. Flora, 68 Wash.App. 802, 845 P.2d 1355 (1992),* to a setting where it is inapplicable, and otherwise adopts a view of Washington law that I do not think likely would be shared by the Washington State Supreme Court. *Flora* held that an "arrest was not entitled to be private," and so police officers making an arrest "could not reasonably have considered their words private." *Id. at 808, 845 P.2d 1355.* The Privacy Act applies to private conversations only, and the Washington Court of Appeals in *Flora* was unwilling to extend the Act's protection to police officers making an arrest "on a public thoroughfare in the presence of a third party and within the sight and hearing of [a] passerby." *Id. at 807, 845 P.2d 1355. In Alford v. Haner, 333 F.3d 972 (2003),* a divided opinion of our court extended *Flora*'s holding to deny Privacy Act protection to police officers making an arrest on a dark and deserted highway. After *Alford,* in the federal courts within the Ninth Circuit, Washington's Privacy Act would not be recognized as offering any protection to police officers making an arrest on a public thoroughfare, period. *See id. at 979.*

If today we only held that Chief Nelson could not arrest Johnson under the Privacy Act because Johnson attempted to record communication made during an arrest on a public thoroughfare, I would join the majority, despite my dissent

in *Alford,* because I am bound by our circuit's precedent. But, alas and alack, I cannot join with my colleagues, because the majority now goes further in its construction and resulting limitation of Washington's Privacy Act to deny the Act's protections to a police officer who was not executing an arrest, who was not located on a public thoroughfare, and who was not within the presence of a third party. When taped by Johnson, Chief Nelson was sitting in his patrol car, in an empty parking lot, engaging in a conversation over the radio with dispatch. The Privacy Act's plain terms cover "individuals" engaged in "[p]rivate communication transmitted by telephone, telegraph, radio, or other device," *Wash. Rev.Code § 9.73.030(1)(a) (2004),* but the majority now holds that an on-the-job police officer in the State of Washington has no reasonable expectation of privacy in a conversation with dispatch over the radio. If such a broad principle is to be endorsed, it should be expressed by the Washington State Supreme Court, not merely imagined by us.[1]

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1. The majority opines that Chief Nelson "knowingly exposed" his communications to the public because he talked while his window was down. But I do not consider this argument controlling because no one was near enough to hear as Chief Nelson communicated with dispatch. Nelson indicated a subjective intent to keep his communication private when Johnson came near the police car: He informed Johnson that he did not consent to the recording and asked Johnson to cease recording. *Cf. State v. Townsend, 147 Wash.2d 666, 674, 57 P.3d 255 (2002)* (en banc) (finding the requisite subjective intent to keep a conversation private met where a person asked for the conversation to remain private). In any event, the subjective intent of the parties is but one factor a court should consider in determining whether a communication is private within the meaning of the Privacy

(Cont'd)

A better approach than that adopted by the majority would be for us to certify to the Washington State Supreme Court the questions of (1) whether Chief Nelson's radio conversation with dispatch, while sitting in his police car in a vacant parking lot in a city park, could be considered private within the meaning of the Privacy Act; (2) and, if not, whether the controlling principle was "clearly established" under Washington law at the time Chief Nelson charged Johnson with a Privacy Act violation. The answers to these questions are dispositive of this case, and in my view have yet to be resolved by the Washington State Supreme Court.[2] Under

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(Cont'd)
Act. *Id. at 673-74, 57 P.3d 255* (including among the factors the subjective intention of the parties, the duration and subject matter of the communication, the location of the communication, and the presence of potential third parties).

The majority cites a 1988 Attorney General Opinion for the proposition that conversations between 911 Central Dispatch and law enforcement are not private because they can be readily monitored and are official, public business. While this argument has some logical force, this 1988 Attorney General Opinion is not the current law of the State of Washington. The Washington State Supreme Court, in its most recent Privacy Act opinion, in 2002, has instructed that the "mere possibility that interception of the communication is technologically feasible does not render public a communication that is otherwise private." *Townsend, 147 Wash.2d at 674, 57 P.3d 255.*

2. While the Washington State Supreme Court recently reiterated the factors that a court may consider under Washington law in determining if a communication is private, *Townsend, 147 Wash.2d at 673, 57 P.3d 255*, the Washington State Supreme Court has never addressed whether on-the-job police officers have a reasonable expectation of privacy in communications with dispatch.

these circumstances, the State of Washington has a procedure permitting us to certify questions for resolution by the Washington State Supreme Court. *Wash. Rev.Code § 2.60.020 (2004)* (allowing certification of a question to the Washington State Supreme Court when "in the opinion of any federal court . . . it is necessary to ascertain the local law of [Washington] in order to dispose of such proceeding and the local law has not been clearly determined").

We are not making the most of our opportunity to cooperate as judicial neighbors, and we are not in tune with the requirements of judicial federalism, when we declare state law whose contours have not been firmly set by the state's own supreme court, without first asking the state supreme court for clarification. The reach of the Privacy Act here is important to the State of Washington and to its citizens, as our holding has the potential to limit the use of police communications with dispatch to cases where the communications may readily be displayed openly to the public eye and ear. Certification is particularly appropriate when a legal issue's resolution can impact state law enforcement. *See Ventura Group Ventures v. Ventura Port Dist., 179 F.3d 840, 843(9th Cir.1999).*

My concern that it would be preferable if we certified the key questions is intensified by the unusual procedural context of *§ 1983* claims, which may be brought in state or federal court. *Martinez v. California, 444 U.S. 277, 283-84, 100 S.Ct. 553, 62 L.Ed.2d 481 (1980)* (holding that federal courts do not have exclusive jurisdiction over *§ 1983* claims, and pointing out that state courts have concurrent jurisdiction to hear such claims). Those who assert claims against police

officers for false arrest under the Privacy Act frequently make a *§ 1983* claim. The majority's decision today will bind federal courts within our circuit, whereas the Washington courts, in my view, might reach a different conclusion. The Washington State Supreme Court will be able to be the final arbiter of the meaning of the Privacy Act as it relates to on-the-job police officers, if it is presented with and rules on the pertinent issues. Yet, a rational plaintiff will not elect to seek an answer from the state courts when we have declared a view of Washington state law so friendly to plaintiffs arrested in Washington under the Privacy Act after taping a police conversation. The probable effect of the majority's decision is that "the many Washington cases addressing enforcement of the Privacy Act by public officers performing official duties," Majority Opinion at 14940, will be brought before and decided by a federal court in the Ninth Circuit, perhaps leaving the Washington State Supreme Court without an opportunity directly to review or correct our interpretation of Washington state law. It is better to recognize that the certification procedure saves "time, energy, and resources and helps build a cooperative judicial federalism." *Lehman Bros. v. Schein*, 416 U.S. 386, 391, 94 S.Ct. 1741, 40 L.Ed.2d 215 (1974).

I also disagree with the majority's analysis of Chief Nelson's claim of qualified immunity. It was not unreasonable, in my view, for Chief Nelson to believe that he had a lawful basis to arrest Johnson for violating the Privacy Act. No decision to date in the Washington state courts, nor in our interpretations of Washington law, has ever held that the Privacy Act fails to offer its protections to an on-the-job police officer, communicating via radio to

dispatch, in a parked squad car, outside the presence of third parties. Before today, that is.

Chief Nelson's on-the-scene determination that he had cause to arrest Johnson under the Privacy Act was at first approved by a judge of the Washington State District Court who, after the fact, found that probable cause existed for arresting and holding Johnson. It seems odd to say that Chief Nelson violated a clearly established right of Johnson when prior decisions limited the Privacy Act's reach only by excluding "public officers performing an official function on a public thoroughfare in the presence of a third party and within the sight and hearing of [a] passerby," *Flora, 68 Wash.App. at 807, 845 P.2d 1355*, not involved here, and when the first state court to review the arrest agreed that Chief Nelson's arrest of Johnson was warranted by probable cause under Washington law.

The only "official function" held by state precedent in *Flora* and our precedent in *Alford* to be non-private was an arrest. But Chief Nelson was not arresting anyone when Johnson taped him. Further, the places where the arrests in *Flora* and in *Alford* occurred were each public thoroughfares, whereas Chief Nelson's encounter with Johnson was in the parking lot of a public city park, which might conceivably be a point of distinction. And Chief Nelson's communication with dispatch was not made in the presence of third persons. When Johnson came within Nelson's sight and hearing, he told Johnson to cease recording his private conversation. Neither the Washington appellate court's decision in *Flora*, nor our extension of *Flora* in *Alford*, addressed the applicability of the Privacy Act in the circumstances presented to Chief Nelson.

I also disagree with the majority's conclusion regarding municipal liability. Johnson's law enforcement expert opined that the Sequim Police Department's policy of assigning responsibility to individual officers of keeping abreast of recent court decisions related to law enforcement amounted to a failure to train Sequim police officers about enforcing suspected violations of the Privacy Act. Even taking this declaration as true, nothing in the record shows that this failure to train amounted to deliberate indifference or that it caused the alleged violation of Johnson's constitutional rights. *See City of Canton v. Harris*, 489 U.S. 378, 389-90, 109 S.Ct. 1197, 103 L.Ed.2d 412 (1989) (finding that a failure to train will represent city policy only where "the need for more or different training is so obvious, and the inadequacy so likely to result in the violation of constitutional rights, that the policymakers of the city can reasonably be said to have been deliberately indifferent to the need"). No evidence indicates that Chief Nelson was unaware of prior Privacy Act case law, or that if he was unaware of such law, a contrary City policy would have led to a different result under the circumstances presented by Johnson's encounter with Nelson. Indeed, given the ambiguity surrounding the extent to which prior decisions of the Privacy Act limited its scope with respect to law enforcement officers, it is hard to say whether any amount of training about state law precedents on Privacy Act enforcement would have prevented this arrest. The state law as declared by the Washington State Supreme Court, or by intermediate appellate courts as in *Flora*, had not set the bounds of the Privacy Act for police officers who were not engaged in making arrests on a public street or highway. There is just no basis, indeed there is no just basis, for *Monell*

liability to be visited upon the City of Sequim, and the city's summary judgment should not have been disturbed.[3]

Finally, I disagree with the majority's conclusion reinstating Johnson's state law tort claim against Chief Nelson for "outrage." The Washington State Supreme Court has limited the scope of the tort of outrage to the most extreme conduct. *Birklid v. Boeing Co.*, 127 Wash.2d 853, 867, 904 P.2d 278 (1995) (limiting the tort of outrage to only those acts that are "so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community."). Here, an initial hearing by a Washington state court judge found probable cause to arrest and detain Johnson. And even though a different state court judge later determined that probable cause was lacking, one cannot properly characterize Chief Nelson's actions as "beyond all possible bounds of decency" or "atrocious," even crediting all of the Johnson's evidence and giving all reasonable inferences to Johnson.

The Washington Supreme Court has often been willing to answer certified questions when tendered by us. *See, e.g., Keystone Land & Devel. Co. v. Xerox Corp.*, 333 F.3d 1093, 1094 (9th Cir.2003); *Parents Involved in Community Schs. v. Seattle Sch. Dist.*, 294 F.3d 1085, 1086-87 (9th Cir.2002); *Broad v. Mannesmann Anlagenbau AG*, 196 F.3d 1075, 1076 (9th Cir.1999). By continuing to extend prior federal and state

3. I agree with the majority's statement in its footnote 2 that Johnson's claims against the County and Sheriff Hawe have no merit, and that the district court's summary judgment for them should be affirmed.

case law to limit the reach of Washington's Privacy Act, we do a disservice to federalism and run the risk of supplanting state law with our own views, when the dispositive Washington Privacy Act questions can be more appropriately resolved by the Washington State Supreme Court in a definitive manner consistent with its view of state law.

I respectfully dissent.

APPENDIX B — ORDER DENYING PLAINTIFF'S MOTION FOR PARTIAL SUMMARY JUDGMENT GRANTING DEFENDANTS MOTIONS FOR SUMMARY JUDGMENT OF THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON AT TACOMA FILED MARCH 12, 2001

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT TACOMA

Case No. 00-5354JKA

ANTHONY L. JOHNSON,

Plaintiff,

v.

THE CITY OF SEQUIM, a municipal corporation, et al.,

Defendant.

ORDER

DENYING PLAINTIFF'S MOTION FOR PARTIAL SUMMARY JUDGMENT

GRANTING DEFENDANTS MOTIONS FOR SUMMARY JUDGMENT

Appendix B

THIS MATTER comes before the court on multiple motions:

1. Plaintiff's Motion for Partial Summary Judgment;

2. Sequim Defendants Motion for Summary Judgment (City of Sequim, Chief Byron Nelson, Mayor Bill Thomas and Officers John Doe 1-10); and

3. Defendants Hawe and Clallam County's Motion for Summary Judgment. The court has reviewed all materials submitted in support of and in response to each of the foregoing motions as well as the files and records herein.

SUMMARY OF CLAIMS AND COUNTER CLAIMS

This litigation arises out of an incident occurring January 28, 2000, when City of Sequim Chief of Police, Byron Nelson, arrested plaintiff at the City of Sequim Skateboard Park following Nelson's request that he not be videotaped by plaintiff. Chief Nelson was sitting in his car communicating on his radio about a matter unrelated to plaintiff. Plaintiff was videotaping Chief Nelson as he sat in his car. Plaintiff Johnson and Defendant Nelson knew each other from prior contacts. Plaintiff was arrested and booked on recording a private conversation without permission and resisting arrest. There is a dispute about the case with which plaintiff was arrested.

On February 2, 2000, the Clallam County Prosecutor charged plaintiff by way of a Criminal Complaint with recording a private conversation by an electronic device or

otherwise without consent and resisting arrest. On that same date, a District Court Judge for Clallam County found probable cause existed for the arrest of the defendant and the filing of the Criminal Complaint.

On April 18, and April 20, the prosecutor filed Amended Criminal Complaints apparently changing the first count to "attempted" recording of a private conversation without the consent of Chief Byron Nelson. The charges were subsequently dismissed by the court.

Thereafter, plaintiff filed this lawsuit. On February 5, 2001, this court entered an order dismissing plaintiff's claims against Clallam County set forth in Paragraphs 35, 40 and 41 of his complaint for wrongful prosecution on the basis of absolute immunity. Plaintiff's remaining claims are as follows:

1. Wrongful arrest and excessive force charges against the Sequim defendants in violation of the First and Fourteenth Amendments to the United States Constitution.

2. Search and Seizure of plaintiff by Sequim defendants in violation of the Fourth and Fourteenth Amendments to the United States Constitution.

3. Incarceration of the plaintiff in violation of the Due Process Clause of the Fourteenth Amendment to the United States Constitution.

4. False Arrest by way of the Arrest, transport, and incarceration of the plaintiff without probable cause.

5. False imprisonment by way of the incarceration of the plaintiff without probable cause.

6. Deprivation of plaintiff's First Amendment Right of free speech by way of the Sequim defendants preventing plaintiff's videotaping.

Sequim defendants counter claim alleging that plaintiff's claims are frivolous under State and Federal Law and constitute the malicious prosecution of a law suit against police officers in violation of RCW 4.24.350 and RCW 4.84.185.

PLAINTIFF'S MOTION FOR PARTIAL SUMMARY JUDGMENT

Plaintiff seeks by way of his Motion for Partial Summary Judgment 1) a determination of liability on the part of Byron Nelson, as the actions for which plaintiff was arrested did not constitute crimes under Washington law; 2) dismissal of defendants' counterclaim on the basis that RCW 4.24.350(2) is an unconstitutional consent-based burden on the speech of citizens who complain that their civil rights have been violated; and 3) dismissal of defendants' counterclaim on the basis that Washington's constitutional litigation privilege prevents an action under RCW 4.24350(2) for statements made in preparation for, or in connection with a lawsuit.

1. Is plaintiff entitled to summary judgment on the issue of liability under 42 U.S.C. § 1983? Plaintiff alleges that because it is undisputed that Byron Nelson was acting under color of state law, and that Byron Nelson's knowing

or intentional conduct deprived plaintiff of his Constitutional right to be protected from an unlawful search and seizure, liability exists as a matter of law.

It is undisputed that Nelson was acting under color of state law. However, the defendants respond alleging qualified immunity on the basis that a reasonable police officer in identical circumstances could believe that his conduct was lawful, and that the plaintiff's Fourth Amendment rights were not violated.

A review of the undisputed facts reveals that a reasonable police officer in identical circumstances could have believed that a law was being broken. The fact that the Washington Privacy Act has been determined to be inapplicable to certain communications by the police (*State v. Flora*, 68 Wn. App. 802), is not determinative in this instance. Here, Nelson was communicating about an investigation which could have been jeopardized by public scrutiny. Nelson was not attempting to speak to or in the presence of plaintiff. He was not engaging in that communication in a public way. Nelson was not the aggressor in this instance. It was plaintiff who approached Nelson. The fact that Nelson is a public officer does not take away every expectation of privacy necessary in the proper performance of his duties. The facts are very dissimilar from those in *Flora* where the communications involved the arrest subject and were made in the presence of third parties with no expectation of privacy. Here, it was not unreasonable for Officer Nelson to have an expectation of privacy.

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2. Should defendants' counterclaims under RCW 4.24.350(2) be dismissed as an unconstitutional consent based burden upon plaintiff's constitutional right? Plaintiff claims RCW 4.24.350(2) affords judicial, prosecutorial, and police officers greater protection from unfounded suits than is afforded other citizens, and is therefore invalid under the First and Fourteenth Amendments. This does not appear to be the case.

This court's reading of RCW 4.24.350(2) reveals a statutory scheme under which judicial, prosecutorial, and police officer's malicious prosecution claims are *limited to $1,000 liquidated damages,* costs, and attorneys fees. It requires both "knowledge of falsity" and "malice". The statute does not concern itself with the content of the claim. The authorities cited by plaintiff deal largely with content based "defamation" claims as opposed to "malicious prosecution" claims.

3. Does plaintiff's claim of absolute immunity defeat defendant's counter claim for malicious prosecution? Plaintiff further asserts absolute privilege because his actions giving rise to defendants' malicious prosecution counterclaim were a part of this "judicial" proceeding. While this may well be true regarding a defamation claim, its application to a malicious prosecution claim would negate any and all causes of action for malicious prosecution. Malicious prosecution claims are by their very nature "judicial."

Plaintiff's Motion for Partial Summary Judgment is denied.

Appendix B

SEQUIM DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

Sequim defendants seek summary judgment dismissing plaintiff's claims as follows: 1) no evidence of any unconstitutional policy or custom which could impose municipal liability for the acts of the individual defendants under 42 U.S.C. § 1983; 2) qualified immunity on behalf of the individual defendants as to plaintiff's claims under 42 U.S.C. § 1983; 3) no prima facie showing to support plaintiff's state law claim of intentional infliction of emotional distress; 4) no prima facie showing to support plaintiff's state law claim of negligent infliction of emotional distress; and 5) insufficient facts to support plaintiff's state law cause of action for false arrest or negligent training hiring.

Plaintiff has not responded to Sequim Defendants' Motion for Summary Judgment. Sequim defendants ask the court to enter an order granting their requested relief pursuant to CR 7(b). Pursuant to Local Rule CR 7(b)(2) plaintiff was obliged to file his opposition to defendants' motion for summary judgment no later than 4:30 p.m. on Monday, March 5, 2001. Pursuant to Local Rule CR 7(b)(4), failure to do so "may be deemed by the court to be an admission that the motion, or the opposition to the motion, as the case may be, is without merit." It is significant to note, that the "default" provision of the rule is discretionary. The issues have been discussed in plaintiff's motion for partial summary judgment and his brief in reply to that motion. Accordingly the court will consider the merits of the motions.

Appendix B

1. Should plaintiff's claims against the City of Sequim under 42 U.S.C. § 1983 be dismissed?

This issue is governed by *Monell v. New York Department of Social Services*, 436 U.S. 658 (1978), wherein it was held:

> ". . . that a local government may not be sued under § 1983 for an injury inflicted solely by its employees or agents. Instead it is when execution of a government's policy or custom, whether made by its lawmakers or by those whose edicts or acts may fairly be said to represent official policy, inflicts the injury that the government as an entity is responsible under § 1983."

Plaintiff has set forth no evidence to support the establishment of a policy or custom generating the actions of Byron Nelson (Chief of Police for the City of Sequim) or W.J. Hawe (Sheriff for Clallam County). Plaintiff seems to rely on the fact that any actions by these individuals must have constituted the policy of their respective municipalities, because as "Chief" and "Sheriff" they were the policy makers. This court cannot make that leap. An "act" does not a "policy" make, whether it be by the policy maker or an underling. There is no evidence of a common scheme or repetitive acts of a similar nature by the defendants.

2. Should plaintiff's claims against the individual Sequim defendants under 42 U.S.C. § 1983 be dismissed? Plaintiff rightly asserts that the individual defendants were acting under color of state law. Defendants are entitled to qualified immunity, however, unless plaintiff can establish

the violation of a clearly established right by an officer whose actions were not objectively reasonable considering the circumstances in light of the knowledge he possessed at the time. *Lambert v. Richard*, 59 F.3d 134 (9th Cir. 1995).

The question of whether there has been a violation of a clearly established right is generally a question of law to be decided by the court. Plaintiff alleges that his right to videotape Chief Nelson was clearly established by virtue of case law interpreting the applicability of the Privacy Act to communications by law enforcement officers. Each case turns on the question of "expectation of privacy" arising out of the case specific facts. In this instance, Chief Nelson was in radio communications with a third party at the time he was being taped by plaintiff. There is absolutely nothing that would suggest that his communication was for public consumption or that he expected it would be overheard by any third party. Given these facts, it was objectively reasonable for Chief Nelson to place the plaintiff under arrest when plaintiff disobeyed his order to cease the videotaping/ surrender the camera. In *Lambert*, the plaintiff's actions were "clearly protected." In the case at bar, plaintiff's acts were not "clearly protected." Police Officers are constantly placed in the position of making instant judgments. Often those judgments are dictated by specific statutory or case law. The nuances of the case law interpreting the Washington Privacy Act are sufficiently fact based, to preclude plaintiff's claim that he had a "clearly established right." Had Officer Nelson been outside his vehicle, speaking aloud to plaintiff and others the situation may have dictated a different result.

Appendix B

3. Has plaintiff made a prima facie showing to establish his cause of action for the intentional infliction of emotional distress? The court finds nothing in the record to support a prima facie case. In order to support a claim for the tort of outrage and/or intentional infliction of emotional distress, one must establish a) extreme and outrageous conduct; b) intentional or reckless infliction of emotional distress; and c) actual result to the plaintiff of severe emotional distress. *Keates v. Vancouver*, 73 Wn. App. 257. In order for plaintiff to prevail, the evidence viewed in a light most favorable to the plaintiff would have to support a finding that defendants went "beyond all possible bounds of decency." *Dicomes*, 113 Wn.2d 630. *Keates* suggests the court consider the position occupied by defendant; whether plaintiff was peculiarly susceptible to emotional distress – and if defendant knew this fact; whether defendant's conduct may have been privileged under the circumstances; the degree of emotional distress caused by a party; and the defendants awareness that there is a high probability that his conduct will cause severe emotional distress. Considering these factors in the context of the tort of outrage or the intentional infliction of emotional distress, there is nothing unusual about the acts of the defendants as law enforcement officers, nor is there any indication that the acts viewed in a light most favorable to the plaintiff would generate severe emotional distress. No reasonable juror could find otherwise.

4. Has plaintiff made a prima facie showing to establish his state causes of action for negligent infliction of emotional distress? The first inquiry in any negligence action is whether the defendant owed a duty of care to the plaintiff. This examination necessitates an analysis of the

relationship between a particular class of plaintiffs and a particular class of defendants. This is a question of law based on "logic, common sense, justice, policy, and precedent." In deciding whether a duty is owed, the primary consideration is whether the conduct in question is unreasonably dangerous. *Keates*. Given the nature of law enforcement duties, there is nothing presented by the plaintiff that reasonable minds could find to be "unreasonably dangerous," as opposed to unpleasant, annoying, harassing, or irritating. It therefore appears that plaintiff has not established that defendant owed him a duty. Beyond that the court sees insufficient evidence from which a jury could find reasonably anticipated resulting emotional distress, and more than minimal mental suffering.

5. Has plaintiff made a prima facie showing to support his state claims for false arrest, and negligent hiring/training? Plaintiff appears to suggest that because the charges for which he was arrested were later dismissed that the arrest was without probable cause. This turns primarily on plaintiff's interpretation of the applicability of the Washington Privacy Act to the facts at hand. While this may be debatable, as discussed above, the arrest of the plaintiff cannot be said to be objectively unreasonable given the circumstances of the moment. Therefore, plaintiff's claim for false arrest fails as a matter of law. Plaintiff argues that he would not have been arrested if the City had properly trained its officers regarding the Washington Privacy Act. For the reasons set forth in *1*, this court does not agree.

Motion for Summary Judgment by Defendants City of Sequim, Chief Byron Nelson, Bill Thomas, and Officers John Doe 1-10 is granted.

Appendix B

CLALLAM DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

Plaintiff's remaining claims against Clallam County and Sheriff W.J. Hawe appear to relate plaintiff's detention in the Clallam County Jail. The claims for wrongful prosecution have been dismissed.

It is undisputed that Clallam County and the City of Sequim have a contractual agreement under which Clallam County agrees to make its facilities and personnel available for the confinement of City of Sequim prisoners, and that plaintiffs incarceration in the Clallam County Jail was pursuant to that agreement and an Authorization for Confinement form signed by Sequim Police Chief Byran Nelson. There is no evidence which would impose liability on Clallam County for wrongful incarceration or false imprisonment. Plaintiff's only complaint about his treatment while incarcerated was the food. Although he didn't like the food, there is no claim that he was harmed by it in any way. He denies being mistreated, abused, or harassed.

Motion for Summary Judgment by Defendants Howe and Clallam County's is granted.

March 12, 2001.

s/ J. Kelley Arnold
J. Kelley Arnold, U.S. Magistrate Judge

(2)

Supreme Court, U.S.
FILED
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OFFICE OF THE CLERK

No. 04-1114

IN THE

Supreme Court of the United States

CITY OF SEQUIM, WASHINGTON, a municipal corporation, CHIEF BYRON NELSON, and DOES 1-10,

Petitioners,

v.

ANTHONY L. JOHNSON,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether a police officer who is the sole percipient witness to conduct that does not violate the law, can claim to have probable cause to make a warrantless arrest of the person who engaged in that conduct.

2. Whether certiorari should be granted to review a Court of Appeals decision applying an established interpretation of a state statute.

3. Whether the Court of Appeals' application of Washington State's Privacy Act in this case – which was consistent with the State's case law, the opinion of its Attorney General, and the decision of a state trial court regarding this very incident – was error.

4. Whether certiorari should be granted to review one ground for a Court of Appeals' decision on summary judgment, when the Court of Appeals decision rests on alternate factual grounds the petitioner has not challenged.

5. Whether a decision upholding an individual police officer's claim of qualified immunity absolves the municipality for which he worked of liability under 42 U.S.C. § 1983.

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No. 04-1114

IN THE

Supreme Court of the United States

CITY OF SEQUIM, WASHINGTON, a municipal corporation, CHIEF BYRON NELSON, and DOES 1-10,

Petitioners,

v.

ANTHONY L. JOHNSON,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF IN OPPOSITION

Respondent Anthony Johnson asks the Court to deny the petitioners'[1] request for certiorari review.

[1] The petition purports to be filed on behalf of all the defendants below, including the City of Sequim. *See* Pet. 1. However, the qualified immunity ruling the petition challenges has no legal application to the municipality, *Owen v. Independence*, 445 U.S. 622 (1980), and the petition does not challenge the Court of Appeals' decision on municipal liability (*see* Pet. App. 17a-21a).

STATEMENT OF JURISDICTION

Respondent agrees this Court has jurisdiction to review the amended order of the Ninth Circuit below, and that the petition was timely filed.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

In addition to the state statutes the petition excerpts, this case involves the following provisions of Washington statutory law:

§ 9.73.070(2), which provides:

> The provisions of this chapter shall not apply to:
>
> (a) Any common carrier automatic number, caller, or location identification service that has been approved by the Washington utilities and transportation commission; or
>
> (b) A 911 or enhanced 911 emergency service as defined in RCW 82.14B.020, for purposes of aiding public health or public safety agencies to respond to calls placed for emergency assistance.

§ 9.73.090(1), which provides in part:

> The provisions of RCW 9.73.030 through 9.73.080 shall not apply to police, fire, emergency medical service, emergency communication center, and poison center personnel in the following instances:

(a) Recording incoming telephone calls to police and fire stations, licensed emergency medical service providers, emergency communication centers, and poison centers;

COUNTERSTATEMENT OF THE CASE

Although the decisions below were rendered on summary judgment, the petition forgets that the respondent is entitled to the benefit of the doubt with respect to all factual disputes and reasonable inferences. The petition's portrayal of the events leading up to respondent's arrest is thus one sided and incomplete. So is the petition's description of the Court of Appeals decision.

1. The Events Leading To Respondent's Arrest.

Notably, the petition says nothing about what is shown by the videotape that is the center of this controversy. The only speech recorded on that videotape is Chief Nelson's challenge to Mr. Johnson: "What do you think you are doing?" *See* Clallam County District Court Memorandum Opinion, Appendix A at 1a-3a.[2] The videotape shows "that Chief Nelson was not engaged by cellular phone or police radio in any conversation or communication with anyone while Johnson was recording him." Pet. App. 5a. This evidence provided an alternative ground for the Court of Appeals decision below that the petition fails to mention.

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[2] The Memorandum Opinion of the Clallam County District Court Judge who dismissed the charges against Mr. Johnson was part of the record in the District Court and Court of Appeals below. 9th Cir. ER 29-35. So was the videotape it described and the evidence it summarized. *See* Pet. App. 17a note 1.

> A genuine issue of material fact exists as to whether Johnson recorded any conversation or communication at all. As Judge Coughenour pointed out when he dismissed the charges against Johnson, the evidence establishes only that Chief Nelson's police radio "was operating" while Johnson videotaped him. In addition, Johnson submitted a videotape in support of his motion for summary judgment which reveals Chief Nelson sitting silently in his police cruiser while he supposedly was engaged in conversation over his cellular phone. Viewed in the light most favorable to Johnson, this evidence suggests there was no conversation or communication taking place while Johnson videotaped Chief Nelson, and thus there was no reasonable basis to arrest him for recording a communication that did not take place.

Pet. App. 17a, note 1.

The petition also glosses over the undisputed fact that these "actions took place in a parking lot, in a public park, at an automobile with it's [sic] windows rolled down, in the presence of or at least certainly potentially in the presence or hearing of passersby." Appendix A at 8a. It was for this reason that the state district court—which applied a review standard under which Chief Nelson had to be given the benefit of every doubt, see *id.* at 9a—"found that even if Chief Nelson had been involved in a communication in his vehicle, there was no expectation of privacy because he had voluntarily exposed any such communication to the public by parking his vehicle in a public place with the windows rolled down." Pet. App. 5a.

It was on the basis of these facts that the Court of Appeals held that a reasonable juror could find that Chief Nelson lacked probable cause to believe that Mr. Johnson had violated Washington's Privacy Act, and that he could not reasonably have believed he had such cause.[3]

2. The Court of Appeals' Decision.

The Court of Appeals opinion began by focusing on the narrow issue with which it was confronted, in light of the evidence described above and the defendants' concessions:

> Defendants do not assert either that Chief Nelson had a privacy interest in his conversation with Johnson during their encounter or that he was involved in a private cellular phone conversation while Johnson videotaped him. Thus, the sole basis for the district court's qualified immunity determination is that Chief Nelson's "communications with others on his police radio"

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[3] The Petition states that Chief Nelson "had no way of knowing that Johnson was not recording" because Johnson had "disabled the video camera's recording indicator light." Pet. 3. This is an exaggeration and a *non sequitur*, unsupported by citation because it was not deemed to be worth mentioning by any of the judges below. The evidentiary basis for it is respondent's own testimony, which was not that he had "disabled" the light, but that he simply turned it off. 9th Cir. ER 16. In that same testimony, respondent testified he told Chief Nelson twice "I'm not recording you." *Ibid.* Since Chief Nelson did not know the light had been turned off, therefore, every bit of information he had indicated that respondent was *not* recording him during that part of their interaction—and the part of the interaction involved is one the petitioners concede cannot be claimed to be private. *See* Pet. App. 8a.

> were private, and thus he had a reasonable belief that probable cause existed to arrest Johnson for recording those communications without his consent.

Pet. App. 8a. The opinion then examined in some detail the state law interpreting the Washington Privacy Act relevant to its application to police radio transmissions in general and the facts of this case in particular. Pet. App. 8a-15a.

The opinion first quoted the Washington Supreme Court's statement of the Act's general purpose is "'to protect individuals from the disclosure of any secret illegally uncovered by law enforcement.' *State v. Fjermestad,* 114 Wn.2d 828, 791 P.2d 897, 902 (Wash. 1990)." Pet. App. 10a. "Accordingly," it noted, "the Washington courts have refused 'to transform the privacy act into a sword available for use against individuals by public officers acting in their official capacity.' *[State v.] Flora,* 845 P.2d at 1357-58." *Ibid.* The opinion then gave three separate reasons the Act clearly did not criminalize Mr. Johnson's alleged attempt to record Chief Nelson's police radio transmission.

First, it observed that the Washington courts had long since rejected an argument "'that public officers performing an official function on a public thoroughfare in the presence of a third party and within the sight and hearing of passersby enjoy a privacy interest which they may assert under the statute.'" Pet. App. 12a, *quoting State v. Flora, supra*, at 1357. Second, it found that Chief Nelson's conduct—engaging in his alleged conversation with his driver side window rolled down, and then rolling down the passenger window, knowing that Mr. Johnson was outside the car videotaping—negated any expectation of privacy. Pet. App. 12a-13a. And third,

"for example" it quoted an Opinion of the Attorney General of Washington, and an Oregon Court of Appeals decision, and cited several federal cases, explaining and holding that police radio broadcasts cannot reasonably be considered private conversations. Pet. App. 13a-14a[4]

From this, the Court of Appeals concluded "that Johnson was arrested without probable cause in violation of the Fourth Amendment because his conduct was not criminal under the Act." Pet. App. 15a. After determining that the state law that compelled that conclusion was clearly established at the time of this arrest, it held that the District Court was wrong to have sustained Chief Nelson's claim of qualified immunity, even accepting the defendants' version of the facts. Pet. App. 16a. In closing, it noted that the District Court's grant of summary judgment was also error for another reason: the factual dispute over "whether Johnson recorded any conversation or communication at all." Pet. App. 17a n.1.

One member of the Court of Appeals panel dissented, arguing that case should be resolved by certifying questions about the Act's scope and application because "the Washington State Supreme Court has never addressed whether on-the-job police officers have a reasonable expectation of privacy in communications with dispatch." Pet. App. 24a-25a (Gould, J.).

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[4] Although the Court of Appeals did not note it, the Attorney General's Opinion was reiterated in the State of Washington's submission in a later federal civil rights case, *Fordyce v. City of Seattle*, 907 F. Supp. 1446 (W.D. Wa. 1996).

These petitioners did not petition the Court of Appeals for rehearing or rehearing en banc.[5]

REASONS FOR DENYING THE PETITION

I. THE COURT OF APPEALS DID NOT HOLD OR SAY THAT DISMISSAL OF A CRIMINAL CHARGE NEGATES PROBABLE CAUSE TO ARREST. WHAT IT DID HOLD—THAT AN OFFICER LACKS PROBABLE CAUSE WHEN HE ARRESTS A PERSON FOR DOING SOMETHING THAT DOES NOT VIOLATE THE LAW—IS INDISPUTABLY CORRECT.

The petition's first question presented suggests that the Court of Appeals decision held that "a constitutional violation [is] conclusively established by proof the plaintiff did not violate the law. . . ." Petition i. It did no such thing. Rather, the Court of Appeals concluded that there was no probable cause for the arrest of Mr. Johnson because the conduct Chief Nelson described was not a crime. Pet. App. 8a-15a.

It is true that the fact an arrestee turned out to be innocent of a criminal charge against him does not *always* imply a lack of probable cause for his arrest. But that does not mean it *never* does. There are innumerable reasons that a criminal charge can result in an acquittal or dismissal. Most of them say nothing about the validity of the person's arrest, but some do. One such reason is that the conduct for which the arrest was made simply does not violate clearly established law. No reasonable juror could find a person guilty beyond a

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[5] A separate set of County defendants did move for clarification of the opinion, which was granted. *See* Pet. App. 2a.

reasonable doubt of a crime based on conduct that the law does not criminalize. Neither can an officer be said to have a reasonably prudent belief that a person has committed a crime when the officer has witnessed the alleged criminal conduct first hand and the conduct he says he witnessed is not illegal.

Thus, in the particular circumstances of the case, the same considerations that led to the dismissal of the charges against Mr. Johnson also lead to the conclusion he was arrested without probable cause. That is why the reasoning of the state district court opinion and the Court of Appeals' opinion are similar. *Compare* App. A with Pet. App. A. But the latter nowhere purports to follow from the former. The Court of Appeals independently and correctly concluded that there was no probable cause for Mr. Johnson's arrest. The fact the state trial judge who reviewed the case reached the same conclusion is no reason to call it into question.[6]

Nothing about the Court of Appeals' reasoning contradicts this Court's governing decisions. This Court has always said that claims of qualified immunity in search or arrest situations must be evaluated "in light of clearly established law and the information the . . . officers

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[6] The petition notes that shortly after Mr. Johnson's arrest "an order determining probable cause was entered. . . ." Pet. 4. That is true; the order was issued ex parte, on the basis of a declaration by Chief Nelson that contradicts his own later report and does not mention the alleged radio communication on which petitioner's case now rests. 9th Cir. ER 38-40. In any event, under the Washington state issue preclusion law that controls in this civil rights case, *see Allen v. McCurry*, 449 U.S. 90 (1980), that nonfinal order is not controlling here. *Noel v. King County*, 48 Wn.App. 227, 234, 738 P.2d 692 (1987); *State v. Dorsey*, 40 Wn. App. 459, 465, 698 P.2d 1109 (1985).

possessed," and the officers' "subjective beliefs . . . are irrelevant." *Anderson v. Creighton*, 483 U.S. 635, 641 (1987). *Hunter v. Bryant*, 502 U.S. 224 (1991), was no exception to this rule. In that case it was never determined that the arrestee had not violated the law, and doubts about his guilt stemmed from the differing inferences and interpretations a reasonable officer could place on his conduct. *See id.* at 227-28. Here, no such interpretations were involved. Chief Nelson knew exactly what he both he and Mr. Johnson were doing. A dozen years worth of Washington and federal authority told him his conversation was not something he could reasonably consider private and Mr. Johnson's actions were not criminal. His subjective belief otherwise—or his ignorance of the state law he was purporting to enforce—cannot afford him qualified immunity.

II. THE PROPER APPLICATION OF A STATE LAW IS NOT A MATTER WARRANTING THIS COURT'S REVIEW; AND THE COURT OF APPEALS' APPLICATION OF THE STATE LAW AT ISSUE HERE WAS CORRECT

The petition in this case does not present any question regarding the Constitution's protections or the proper analysis of claims of qualified immunity. That is not surprising, because the Court of Appeals carefully followed the approach this Court mandated in *Saucier v. Katz*, 533 U.S. 194 (2001), for analyzing assertions of qualified immunity. *See* Pet. App. 7a-8a.

The petition does not assert that the Court of Appeals has misinterpreted the scope of a right protected by the Constitution, or that it has erred in determining whether and when such a right was clearly established. Instead,

petitioner's complaint is that the Court of Appeals has mistakenly interpreted the scope of a state statute, Washington State's Privacy Act—or that it has wrongly applied an interpretation of that statute that was not clearly established at the time of respondent's arrest. Petition 16-23.

To begin with, the interpretation and application of a state statute—or the determination of how clearly such a statute had been interpreted—hardly seems a question that calls for this Court's review. *See* Supreme Court Rule 10. To the contrary, this Court's "custom on questions of state law ordinarily is to defer to the interpretation of the Court of Appeals for the Circuit in which the State is located." *Elk Grove School Dist. v. Newdow*, 542 U.S. 1, __, 124 S. Ct. 2301, 2311 (2004).

Moreover, the Court of Appeals' interpretation and application of the Washington Privacy Act in this case was quite clearly correct and consistent with a substantial body of Washington caselaw. Petitioner's description of that law is simply incomplete.

The Court of Appeals did not purport to comprehensively survey the Washington state courts' interpretation of the state's privacy act; but its review of that law was much more extensive than petitioner gives it credit for. *See* Pet. App. 10a-13a. That law was summed up in a jury instruction from *Alford v. Hainer*, 333 F.3d 972 (9th Cir. 2003), *reversed on other grounds sub. nom., Devenpeck v. Alford*, 543 U.S. __, 125 S. Ct. 588 (2004), which clearly stated the very principle the Court of Appeals applied: "It is not a violation of the Washington privacy act to tape record a police officer in the performance of an official function on the public thoroughfare." *See* App. 11a, quoting *Alford*, 333 F.3d at 977.

Petitioner claims *Alford* and *State v. Flora,* 68 Wn. App. 802, 845 P.2d 1355, 1357 (1992) stand only for the narrow rule that "an arrest is not a private conversation. . . ." Petition 6. But the law set out in those cases was considerably broader than that. *Flora* broadly said that police officers cannot expect to keep private what they do and say "in the course of performing their official and public duties[,]" *Flora,* 845 P.2d at 1357. *Alford* restated that same proposition.

That jury instruction in *Alford* was given in a jury trial held in the year 2000, the year of petitioners' arrest. See *Devenpeck v. Alford*, 125 S. Ct. at 592. The trial judge who gave that instruction was the Hon. Robert Bryan, one of the most experienced and respected trial judges in Washington history.[7] The precedents *Alford* reflected included a reported federal district court civil rights declaratory judgment—issued in lieu of injunction—"that RCW 9.73.030 does not prohibit the recording of a conversation held in a public street, in voices audible to passersby, by the use of a readily apparent device." *Fordyce v. City of Seattle*, 907 F. Supp. 1446 (W.D. Wa. 1995). The declaratory judgment interpreting the statute in *Fordyce* was issued in the context of a false arrest claim, and was specifically endorsed by the Attorney General of Washington participating as *amicus curiae* in that case. 907 F. Supp. at 1447-1448.

That decision followed on a line of Washington cases rejecting claims of violation of the statute and expectations

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[7] Senior District Judge Robert Bryan served 17 years as a Washington State Superior Court Judge before his 1986 appointment to the United States District Court for the Western District of Washington. See Federal Judicial Center, Federal Judges Biographical Database, Robert J. Bryan (http://air.fjc.gov/public/home.nsf/hisj (last visited April 15, 2005).

of privacy, where statements were made at a public meeting where minutes were kept available, *State v. Slemmer*, 48 Wn. App. 48, 52, 738 P.2d 281 (1987), and where a person calling a police station necessarily must have expected that the contents of his conversation would have been passed on to others there, *State v. Forester*, 21 Wn. App. 855, 861, 587 P.2d 179 (1978).

In addition, the relevant Washington law clearly established at the time of Mr. Johnson's arrest included two statutes, which the petition ignores. The first of these specifically exempted calls made to police stations. RCW 9.73.090(1)(a) (1977). The second exempted all communications involving "a 911 or enhanced 911 emergency service" such as the one that Chief Nelson claims he was attempting to contact. *See* RCW 9.73.070(2)(b) (1991). The first of these statutes provided part of the basis for the Washington Attorney General's Opinion that the Court of Appeals quoted as an "example" of the broad consensus that police radio broadcasts are not "private." See Pet. App. 14a, quoting 1988 Washington Attorney General Opinion No. 11. The second of these statutes (which the parties below apparently overlooked) confirms the Opinion was correct.

In sum, at the time of Mr. Johnson's arrest Washington law included an Attorney General's Opinion concluding that police radio transmissions were not "private" under the Act,[8] followed by a statute so providing with regard to all 911

[8] Although petitioner denigrates them (Pet. 16-17), in Washington Opinions of the Attorney Generals are considered "persuasive authority to which [courts] . . . give "great weight." *Branson v. Port of Seattle*, 152 Wn.2d 862, 884-885 101 P.3d 67 (2004), *quoting Thurston County ex rel. Bd. of County Comm'rs v. City of Olympia*, 151 Wn.2d 171, 177, 86 P.3d 151 (2004).

communications, followed by state and federal court opinions stating and holding that police officers' public actions are not private under the Act. In the same year of Mr. Johnson's arrest, a federal judge restated the latter rule in a jury instruction later adopted by the Court of Appeals.

Thus, even assuming that petitioner is right in its implicit assumption that officers can claim qualified immunity on the ground that state statutory law, as opposed to federal constitutional law, is not clearly established—an assumption the Court of Appeals made on petitioner's behalf, but one to which petitioner may not have been entitled[9]—Washington law clearly gave Chief Nelson "fair notice," *Hope v. Pelzer*, 536 U.S. 730, 739 (2002) that he was arresting Mr. Johnson for something that did not violate the law. The Court of Appeals did not err by so holding.

III. THE DECISION BELOW RESTS ON ALTERNATE GROUNDS THAT THE PETITION DOES NOT CHALLENGE.

The petition also glosses over the fact that the Court of Appeals' decision adverse to both of the petitioners rested on alternate grounds the petition does not challenge.

With respect to Chief Nelson, as noted above, the Court of Appeals majority expressly rested its decision on the alternate ground that "[a] genuine issue of material fact exists as to whether Johnson recorded any conversation or

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[9] *See Davis v. Scherer*, 468 U.S. 183, 194 (1984) ("clearly established" requirement limited to the constitution and "statute or regulation [that] provides the basis for the cause of action sued upon. . . .")

communication at all." *See* Pet. App. 17a n.1. The petition suggests no reason this Court should review, or fault, that alternate conclusion. The petition concedes that clearly established Washington law established that an officer could not "arrest an individual attempting to record or intercept an interaction between him and the police officer that both concerned that citizen and was initiated by the police officer." Petition 22. Thus, even under their cramped and incomplete reading of Washington law, petitioners cannot fault the Ninth Circuit for its conclusion that Mr. Johnson could not have been arrested for recording the challenge Chief Nelson directed at him—the only words actually spoken on the videotape. If in addition it is true, as Mr. Johnson's evidence shows, that Chief Nelson was never speaking or attempting to speak to anyone else at a time he had reason to believe Mr. Johnson was taping, he could not possibly have had probable cause. In other words, if Chief Nelson is not telling the truth about his alleged attempts to make a radio call in Mr. Johnson's presence—as the state district court plainly suspected he was not (Appendix 2a-3a), and a reasonable juror could find—not even petitioners can advance a claim that he had probable cause.

Similarly, Chief Nelson does not challenge the Court of Appeals decision that he lacked a reasonable expectation of privacy in any conversations he might have had because he "knowingly expose[d] them to the public." Pet. App. 12a. The state district court also found this fact to be itself dispositive of the charge against Mr. Johnson. Appendix 8a-9a. Again, a reasonable juror could find that Chief Nelson acted without probable cause on the basis of this fact alone.

Finally, the Court of Appeals decision adverse to Clallam County would stand, even if Chief Nelson were found to be

entitled to qualified immunity. Municipalities, of course, cannot claim qualified immunity. *Owen v. City of Independence, supra*. The questions petitioner has presented to this Court all involve qualified immunity. *See* Petition i. [10] Thus, even if Chief Nelson were successful and obtained reversal on the basis of qualified immunity, petitioner's claim against the City of Sequim arising from this incident would be unaffected.

CONCLUSION

The petition for certiorari should be denied.

Respectfully submitted,

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[10] The petition conflates qualified immunity with substantive constitutional law in its assertion that "a finding by this Court that Chief Nelson did not violate a clearly established right of Johnson would obviate any further need to consider" petitioner's *Monell* claims against the City. Pet. 8 n.2. The fact an officer is entitled to qualified immunity does not mean he has not violated the Constitution; the two questions are distinct. That is the central holding of *Saucier v. Katz, supra*.

APPENDIX A — MEMORANDUM OPINION OF THE CLALLAM COUNTY DISTRICT COURT DATED MAY 9, 2000

CLALLAM COUNTY DIST. COURT

NO. 2779-00

STATE OF WASHINGTON,

Plaintiff,

vs.

ANTHONY JOHNSON,

Defendant.

FINDINGS OF FACT

Based on testimony of Chief Byron Nelson and Tony Johnson together with the report attached to the defendants motion to dismiss as well as a view of the video tape entered into evidence, these are the following findings of fact:

On Friday, January 28, 2000, at approximately 4:10 p.m. Chief Byron Nelson who was familiar with the defendant Anthony Johnson was located at the Carrie Blake Park Skateboard Park in the City of Sequim. Mr. Johnson was at the skateboard park recording his friends skateboarding and he noticed Chief Nelson. Mr. Johnson pointed the video recorder toward Chief Nelson in his unmarked patrol vehicle which was recognizable to Mr. Johnson as a police vehicle. Mr. Johnson videotape recorded Chief Nelson who had

appeared on the tape to be looking in Mr. Johnson's direction at the time. Chief Nelson in his testimony acknowledged that he could see Mr. Johnson pointing the video camera in his direction from 75 feet away. The video which lasted approximately 30 seconds was a side shot of the police vehicle using a zoom lens, showing Chief Nelson seated in the drivers seat looking at Mr. Johnson through a closed window. Chief Nelson indicated in his report that he saw Johnson begin walking towards his parked vehicle.

This is where testimony diverges somewhat. Chief Nelson states that he saw Mr. Johnson in front of his police car one foot from the bumper and watched him walk to the drivers side within two feet of his vehicle pointing his camera into the window which was now down and his police radio was operating. Mr. Johnson then according to Chief Nelson walked to the rear of his vehicle pointing the camera at the interior of his car walking to the right side of his car.

Mr. Johnson describes the incident and drew a diagram showing that he walked around several parked cars to the rear of Chief Nelson's car and activated his video camera again for approximately 10 seconds from the rear of the vehicle to the closed passenger window of the vehicle at which time Chief Nelson rolled down the window. Chief Nelson then stating "What do you think you are doing?" at which time the video clip turns off.

Chief Nelson indicates that he was dialing his cellular telephone at the time to contact dispatch in regard to the investigation of a juvenile runaway. He indicates that it rang twice, but he never completed the call and directed his

attention to Mr. Johnson. It is interesting to note that Chief Johnson indicates he was calling to verify that the juvenile runaway was wanted and to obtain a description of him although he indicates he had gone to Carrie Blake Park to look for the same runaway. Chief Nelson claims it appeared to him that Mr. Johnson was continuing to video tape after he was asked "What do you think you are doing?" and Mr. Johnson indicated that he never recorded again after that statement. Chief Nelson then went on to indicate that he told the suspect to turn off his video camera and that he did not have his permission to record him and that it was a violation of the law to record conversations without consent. An argument ensued. Chief Nelson indicated that he wanted to view the tape that Johnson had in his recorder to verify whether Johnson was recording him and any conversations or communications over the police radio or with him. The confrontation finally resulted in Chief Nelson taking hold of Johnson's arm. The facts beyond this portion of the encounter are unnecessary for determination on this issue before me now, that being failure to establish a prima facie case.

CONCLUSIONS OF LAW

Any determination of whether the state can establish a prima facie case against any defendant begins with the statutory language of the charge itself.

> (1) Except as otherwise provided in this chapter, it shall be unlawful for any individual, partnership, corporation, association, or the state of Washington, its agencies, and political subdivisions to intercept or record any:

Appendix A

(a) Private communication transmitted by telephone, through telegraph, radio, or other device between two or more individuals between points within or without the state by any device electronic or otherwise designed to record and/or transmit said communication regardless how such device is powered or actuated, without first obtaining the consent of all the participants in the communication;

(b) Private conversation, by any such device electronic or otherwise designed to record or transmit such conversation regardless how the device is powered or actuated without first obtaining the consent of all persons engaged in the conversation.

The statute is within the Washington State Privacy Act and various cases have discussed the underlying purpose that this Privacy Act covers. The act generally prohibits interception, transmission, or recording of private communication or private conversation without consent of all parties involved in the communication *Kadoranian by Peach vs. Bellingham Police Department*, 119 Wash.2d 178, 829 P.2d 1061 (1992). Many of the cases describe the primary purpose as protecting an individuals privacy and to protect against illegally obtained information *State v. Corliss*, 67 Wash.App. 708, 838 P.2d 1149 (1992), *State v. Baird*, 83 Wash.App. 477, 922 P.2d 157 (1996). Since the statute emphasizes "private communication" and "private conversation" but does not define the word "private" itself, we must look to case law for the definition.

Appendix A

The Supreme Court in *State v. Faford*, resorted to Websters Third New International Dictionary (1969) for the ordinary and usual meaning of the term.

> "Belonging to one's self . . . secret . . . intended only for the persons involved (a conversation) . . . holding a confidential relationship to something . . . a secret message: a private communication . . . secretly: not open or in public."
>
> *Kadoranian*, 119 Wash.2d at 190, 829 P.2d 1061 (quoting State v. Forrester, 21 Wash.App. 855, 861, 587 P.2d 179 (1978), review denied, 92 Wash.2d 1006 (1979)). Whether a conversation qualifies as private is a question of fact determined by the intent or reasonable expectations of the parties. *Kadoranian*, 119 Wash.2d at 190, 829 P.2d 1061.

In that case the Supreme Court reviewed other cases that consider the surrounding facts and the reasonable expectations of the parties. An inconsequential no-incriminating telephone conversation lacks the expectation of privacy necessary to trigger the privacy act (*Kadoranian*) as well as a public meeting where public minutes are available, *State v. Slemmer*, 48 Wash.App. 48, 738 P.2d 281 (1987). In that case as well, the court reviews factors such as the intrusive nature of the interception and whether it is accidental or unintentional.

Appendix A

In analyzing the words "private conversation" Division I in *State v. Grant*, 9 Wash.App. 260, 511 P.2d 1013 (1973) did not want to narrowly construe the phrase but did describe them as conversations "intended only for the ears of the participants." To complete this discussion it is necessary to recite what is clearly not private. In *Fordyce v. City of Seattle*, 907 F.Supp. 1446 (W.D.Wash. 1995) the United States District Court found that the statute does not make criminal the recording of conversations held on a public street or voices audible to passersby by use of a readily apparent device. It is also clear that RCW 9.73.030 only bans audio recording of private conversations, not video recordings of persons images. *Haymond vs. Department of Licensing*, 73 Wash.App. 758, 872 P.2d 61 (1994). In summary, the Supreme Court in *State v. Clark*, 129 Wash.2d 211, 916 P.2d 384 (1996) stated as follows:

> Whether a particular conversation is private is a question of fact, but where the facts are undisputed and reasonable minds could not differ, the issue may be determined as a matter of law, *Kadoranian*, 119 Wash.2d at 190, 829 P.2d 1061. In deciding whether a particular conversation is private, we consider the subjective intentions of the parties to a conversation. *State v. Faford*, 128 Wash.2d 476, 910 P.2d 447 (1996) (expectation of privacy in use of cordless phone). But our inquiry does not stop there because any defendant will contend that his or her conversation was intended to be private. We also look to other factors bearing upon the reasonable expectations and intent of the participants.

Appendix A

The court enunciated three factors significant in the factual determination:

1. Duration and subject matter of the conversation.

2. Location of conversation and presence or potential presence of a third party.

3. Role of the non-consenting party and his or her relationship to the consenting party.

It is under this framework that I analyze the facts of this case.

Interactions between police officers and the public is inherently not private. A conversation on a public thoroughfare and the presence of a third party and within the sight and hearing of passersby is not private. *State v. Flora*, 68 Wash.App. 802, 845 P.2d 1355 (1992). In *Flora* the accused party in that case hid a small tape recorded in a pile of papers when he was having an interaction with police officers. The court found that the conversation at issue in that case was "indeed not private". The Court stated:

> "The state urges us to adopt the view that public officers performing a social function on a public thoroughfare in the presence of a third party and within the sight and hearing of passersby enjoy a privacy interest which they may assert under the statute. We reject that view as wholly without merit."

Appendix A

Once again the emphasis was on safeguarding "private conversations" and that there must be something in the nature of prying or intrusion.

Duration and subject matter of the conversation. In the case at bar, in regard to the attempted telephone call, there was no conversation. There was no private communication in existence. Just as the court in *Haymond v. Department of Licensing*, said at page 63 "a party to a conversation cannot record the conversation using an electronic device that does not work", a person holding a video camera with audio capabilities cannot record a conversation that does not occur. Even to try to view this activity as an attempt to record a private conversation, it would still fail in that the statutory elements of criminal attempt are intent plus substantial step toward commission of a crime, *State v. Rhode*, 63 Wash.App. 630, 821 P.2d 492 (1991). To view the facts even in the light most favorable to Chief Nelson (that Mr. Johnson walked by his open window holding the video camera), there can't be an intent to record a conversation that isn't occurring. The communication didn't yet exist. A telephone call is being attempted by a person whose window is purposely down and who is aware of the presence of an individual with a video camera. As to duration then, there is no duration.

In regard to the officer rolling his other window down and stating "What do you think you are doing?", the subject matter of the conversation is not yet even a conversation. It is a question and it does not seem that that statement was intended or reasonably expected to be kept secret.

Appendix A

Location of conversation and presence or potential presence of a third party. These actions took place in a parking lot, in a public park, at an automobile with it's windows rolled down, in the presence of or at least certainly potentially in the presence or hearing of passersby. The fact that a transaction is conducted with the public has been enough for the Supreme Court to find that such transaction is not private, even when the transaction takes place inside a private home, a location normally affording maximum privacy protection *State v. Hastings*, 119 Wash.2d 229, 830 P.2d 658 (1992).

Role of the non-consenting party and his or her relationship to the consenting party "What is voluntarily exposed to the general public is not considered part of a persons private affairs. *State v. Goucher*, 124 Wash.2d 778, 881 P.2d 710 (1994). Chief Nelson's role in this incident is as an acting participant as opposed to one whose privacy is being intruded upon. The officers role at the time was as a public officer in a public park talking to a member of the public. No intention to keep to himself has been exhibited in that the officer himself acting on both occasions to roll down the window of his automobile in order to allow his communication to even possibly be intercepted.

As stated in *State v. Flora*, the privacy act should not be used as a sword for use against individuals by public officers acting in their official capacity. The state has failed to make a prima facie case of interception under the privacy act in this case because there is no private communication or private conversation upon which a charge could be based. Even when viewing the evidence in the light most favorable to the state,

there is no prima facie case against Mr. Johnson and the charges should be dismissed as per *State v. Knapstad*, 107 Wash.2d 346, 729 P.2d 48 (1986). This ruling resolves all charges by dismissal in that defendant under the circumstances could not be convicted of resisting arrest or the proposed amended charge of obstructing a public officer.

DATED: 5/9/00 /s/ _____
BRIAN PAUL COUGHENOUR,
Pro tem Judge

(3)

Supreme Court, U.S.
FILED
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No. 04-1114

IN THE

Supreme Court of the United States

CITY OF SEQUIM, WASHINGTON, a municipal corporation, CHIEF BYRON NELSON, and DOES 1-10,

Petitioners,

v.

ANTHONY L. JOHNSON,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY BRIEF

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Respondent Anthony Johnson's brief in opposition makes several misstatements of fact and misstates some of the questions presented by Petitioners. These are apparent on their face and, thus, Petitioners believe it is not necessary to refute each such misstatement. Petitioners ask that their silence on these matters not be interpreted as agreement or acquiescence therewith. Three points raised by Johnson, however, merit brief reply.

REPLY ARGUMENT

A. The absence of probable cause for an arrest is not established by a determination that a plaintiff did not commit the crime for which he was arrested.

Johnson makes much of the factual findings and analysis of the state district court's opinion dismissing the criminal charges against him. *See* Resp. App. A; Brief in Opposition at pages 3-5, 9. He also relies heavily on the Ninth Circuit's determination that Johnson did not violate the Privacy Act. Brief in Opposition at pages 8-10. The purpose of this focus is to reinforce his contention that probable cause for his arrest clearly was absent. His focus, however, only serves to emphasize the need for review by this Court.

The Ninth Circuit and Johnson are both incorrect in reasoning that whether Chief Nelson had probable cause to arrest Johnson depends on whether Johnson violated the Privacy Act. The fact that Johnson was later found not to have violated the Act — whether by the state district court in dismissing the criminal charges or by the Ninth Circuit through its erroneous qualified immunity analysis — does not mean he was arrested without probable cause. The correctness of this conclusion is apparent by the fact that before dismissing the criminal charges, a state district court, interpreting Washington law, actually found probable cause

for Johnson's arrest. Pet. App. A at 4a-5a. How can Chief Nelson be later said to not have had probable cause to arrest Johnson for violating the Privacy Act when a court of competent jurisdiction charged with the interpretation and application of Washington law found that he did? Johnson makes no mention of this prior, unchallenged finding of probable cause, nor does he make any attempt to explain why this finding is not material to the question of whether Chief Nelson is entitled to qualified immunity. Nor does he attempt to explain how the Ninth Circuit could have found an absence of probable cause in the face of this finding.

"Whether probable cause exists depends upon the reasonable conclusion to be drawn from the facts known to the arresting officer at the time of the arrest." *Devenpeck v. Alford*, __ U.S. __, 125 S. Ct. 588, 593, 160 L. Ed. 2d 537 (2004); *see also Act Up!/Portland v. Bagley*, 988 F.2d 868, 873 (9th Cir. 1993) (and cases cited therein). A subsequent dismissal of a criminal charge is not relevant to this analysis. *See* Petition at pages 11-16. Neither is a hindsight-viewing of the videotape (which Johnson has presented as an "alternative ground" for the Ninth Circuit's reversal of summary judgment and a basis for denying this Petition), especially given that what was or was not recorded was in Johnson's exclusive control. *See* Brief in Opposition at pages 14-15. Probable cause for an arrest must focus on the lawfulness of the arrest, not on the lawfulness of the arrestee's actions. Thus, the question whether criminal charges are or can be sustained after arrest must be kept separate from the qualified immunity analysis.

B. Alleged issues of fact do not necessarily preclude summary judgment on qualified immunity.

Johnson is mistaken as to the burden of proof for purposes of qualified immunity. *See* Brief in Opposition at page 3, 14-15. It is not correct that summary judgment on qualified immunity can be granted in favor of a police officer only if the undisputed facts lead to just one conclusion. *Hunter v. Bryant*, 502 U.S. 224, 227-28, 112 S. Ct. 534, 116 L. Ed. 2d 589 (1991). As this Court explained in *Hunter*,

> This statement of law is wrong for two reasons. First, it routinely places the question of immunity in the hands of the jury. Immunity ordinarily should be decided by the court long before trial. Second, the court should ask whether the agents acted reasonably under settled law in the circumstances, not whether another reasonable, or more reasonable, interpretation of the events can be construed five years after the fact.

Id. at 228 (internal citation omitted).

The fact that Johnson and the Ninth Circuit are able to posit a different interpretation of the events leading to Johnson's arrest based on an analysis of whether he committed the crime for which he was arrested does not mean that Chief Nelson arrested him without probable cause, nor does it mean that summary judgment on qualified immunity was not appropriate. Johnson's and the Ninth Circuit's focus on alleged issues of fact alone are not sufficient to submit the question of qualified immunity to a jury.

C. The City of Sequim's potential liability is not at issue with this Petition.

The Ninth Circuit specifically declined to reach the issue of the City's liability and directed the district court to address evidentiary issues related to Johnson's claim against the City on remand. Pet. App. A at 19a. Johnson incorrectly argues that the City of Sequim is claiming it is entitled to qualified immunity. *See* Brief in Opposition at pages 15-16. Petitioners brought the City's alleged liability, as well as Johnson's outrage claim, to the attention of this Court only for the purpose of advising that the Court need not consider these claims in order to grant the relief Petitioners request. *See* Petition at page 8 n.2. A ruling by this Court in favor of Chief Nelson on qualified immunity will likely affect the subsequent determination of the City's liability and Johnson's outrage claim, but at the district court level upon remand. Petitioners are not seeking any review or ruling by this Court on either of those claims.

CONCLUSION

The petitioners respectfully request this Court grant their petition for a writ of certiorari.

Respectfully submitted,

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